NOTE

This Microfiche meets the quality requirements of the American National Standard for Microfiche of Documents (ANSI PH5.9-1975). However, because of imperfections in the document from which it was made, it contains images that are illegible or difficult to read. The source document for this microfiche is the best copy that could be obtained prior to filming.

Congressional Information Service, Inc.
Washington, D.C.

CIS

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1981

HEARINGS
BEFORE THE
SUBCOMMITTEE ON LABOR
OF THE
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE
NINETY-SEVENTH CONGRESS
FIRST SESSION
ON
S. 1182

A BILL TO AMEND THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT TO REVISE THE MANNER OF COMPUTING THE BENEFITS PROVIDED UNDER SUCH ACT, TO PROVIDE FOR CERTIFICATION OF PHYSICIANS ELIGIBLE TO PROVIDE MEDICAL CARE TO WORKERS COVERED BY SUCH ACT, TO PROVIDE FOR AN ATTORNEY TO SERVE AS REPRESENTATIVE OF THE SPECIAL FUND ESTABLISHED UNDER SUCH ACT, TO ESTABLISH A BENEFITS REVIEW BOARD THE MEMBERS OF WHICH ARE APPOINTED BY THE PRESIDENT, TO ESTABLISH AN ADVISORY COMMITTEE TO EVALUATE THE MANNER IN WHICH THE PROVISIONS OF THE ACT ARE CARRIED OUT, AND FOR OTHER PURPOSES

JUNE 16, 17, 23, AND OCTOBER 5, 1981

Printed for the use of the Committee on Labor and Human Resources

84-242 O

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1981

S541-8

COMMITTEE ON LABOR AND HUMAN RESOURCES

ORRIN G. HATCH, Utah, *Chairman*

ROBERT T. STAFFORD, Vermont
DAN QUAYLE, Indiana
PAULA HAWKINS, Florida
DON NICKLES, Oklahoma
LOWELL P. WEICKER, Jr., Connecticut
GORDON J. HUMPHREY, New Hampshire
JEREMIAH DENTON, Alabama
JOHN P. EAST, North Carolina

EDWARD M. KENNEDY, Massachusetts
JENNINGS RANDOLPH, West Virginia
HARRISON A. WILLIAMS, Jr., New Jersey
CLAIBORNE PELL, Rhode Island
THOMAS F. EAGLETON, Missouri
DONALD W. RIEGLE, Jr., Michigan
HOWARD M. METZENBAUM, Ohio

Robert P. Hunter, *Chief Counsel*
Renn M. Patch, *Staff Director*
Lawrence C. Horowitz, M.D., *Minority Staff Director*

Subcommittee on Labor

DON NICKLES, Oklahoma, *Chairman*

ORRIN G. HATCH, Utah
JOHN P. EAST, North Carolina
ROBERT T. STAFFORD, Vermont
DAN QUAYLE, Indiana
PAULA HAWKINS, Florida

HARRISON A. WILLIAMS, Jr., New Jersey
EDWARD M. KENNEDY, Massachusetts
JENNINGS RANDOLPH, West Virginia
DONALD W. RIEGLE, Jr., Michigan

Richard C. Lawson, *Co-counsel*
Charles T. Carroll, Jr., *Co-counsel*
Steven J. Sacher, *Minority Counsel*

CONTENTS

Page

Text of:
  S. 1182 ... 4

CHRONOLOGICAL LIST OF WITNESSES

TUESDAY, JUNE 16, 1981

Nunn, Hon. Sam, a U.S. Senator from the State of Georgia ... 17

Gardner, William L., Esq., representing Braswell Shipyards, Inc., S.C., accompanied by James Braswell, vice president, Braswell Shipyards, and Rick Meitzler, safety director, Braswell Shipyards; R. A. (Red) Osborn, Jr., Esq., representing the National Association of Manufacturers and the New Orleans Steamship Association, accompanied by Daniel Vannoy, director, product liability and employee compensation systems for National Association of Manufacturers; William H. Taylor, Esq., representing National Steel and Shipbuilding Co., a panel ... 26

Huff, William H., III, senior vice president and general counsel, Employers Insurance of Texas, accompanied by Pat Whatley, associate actuary, and Roy Moore, manager, Maritime Claims; William Lachner, vice president, special risk facility, Insurance Company of North America; James F. Hughes, vice president, Midland Insurance Co., New York ... 112

Smith, Hon. Samuel J., Chief Administrative Appeals Judge, Benefits Review Board, U.S. Department of Labor, accompanied by Brian Meyers, acting senior board attorney ... 167

WEDNESDAY, JUNE 17, 1981

Steiner, Robert N., assistant director, Port Department, New York, Port Authority of New York/New Jersey ... 224

Wilcox, Thomas D., executive director and general counsel, National Association of Stevedores, accompanied by Arthur E. Erb, president, National Association of Stevedores; and Dennis Lindsay, Esq., representing Master Contracting Stevedore Association of the Pacific Coast, Inc ... 239

Sullivan, Patrick J., legislative director, International Longshoremen's Association, Washington, D.C., accompanied by Joe Leonard; Michael Lewis, Washington representative, ILWU, accompanied by Bruce Krieger, welfare affairs, ILWU; and Bill Luch, ILWU Local 8, Portland, Oreg ... 350

Guillen, Frank, welfare officer, local 9, of the Industrial Union of the Marine & Shipbuilding Workers of America, accompanied by Tom Perry, counsel; Jim Harmon, executive secretary; and Kevin Sullivan; and John J. Sheehan, legislative director, United Steelworkers of America, accompanied by John Hower, subdistrict director, Virginia area; Carl Hall, chairman, Tenneco local union, Newport News, Va.; David Demilano, Washington staff ... 661

Hood, Edwin M., president, Shipbuilders Council of America, accompanied by Bill Welch, chairman, workers' compensation committee; Stephen B. Clarkson, Stewart E. Niles, Jr., and Junius C. McElveen, Jr., special counsel ... 735

Potter, William H., president and treasurer of Fairhaven Marine, Inc., Massachusetts, representing American Boat Builders & Repairers Association, Inc.; John Buursema, president of Twin City Shipyard, St. Paul, Minn., representing American Waterways Shipyard Conference; and Robert J. Massman, secretary of Massman Construction Co., St. Louis, Mo., a panel ... 909

TUESDAY, JUNE 23, 1981

Page

Leavitt, Bert J., president, Leavitt Insurance Agency, Las Vegas, Nev., chairman, National Insurance Producers Conference, and president, National Association of Professional Insurance Agents; Frank L. Eblen, vice president, Johnson & Higgins, New York, N.Y., and member, National Association of Insurance Brokers, Inc.; Howard J. Cornay, Jr., senior vice president, Bayly, Martin & Fay, Inc., Lafayette, La., and member, National Association of Casualty & Surety Agents; Paul D. Snodgrass, Ralph W. Lee & Co., Washington, D.C., president, Metropolitan Washington Independent Insurance Agents, and member, Independent Insurance Agents of America, Inc.; and Daniel J. Blum, president, Insurance House, Inc., Lafayette, La., and member, National Association of Professional Insurance Agents, a panel 942

Erlenborn, Hon. John, a Representative in Congress from the State of Illinois. 968

Power, Jay, legislative representative, American Federation of Labor and Congress of Industrial Organizations, accompanied by Larry Smedley, social security department, AFL-CIO; Frances Zwenig, legislative representative, Building and Construction Trades Department, AFL-CIO, accompanied by Donald Elisburg, former Assistant Secretary of Labor for Employment Standards; and Ande Abbott, international representative, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO, a panel 983

Maisonpierre, André, senior vice president, Alliance of American Insurers, accompanied by Roy Kallop, vice president and actuary, National Council on Compensation Insurance; Robert W. Flockhart, counsel, American Insurance Association; and Howard Bunn, vice president for workers' compensation, National Association of Independent Insurers, a panel 1037

MONDAY, OCTOBER 5, 1981

Collyer, Hon. Robert B., Deputy Under Secretary, Employment Standards Administration, Department of Labor, accompanied by Ralph M. Hartman, Director, Office of Workers' Compensation Programs; Neil Montone, Associate Director of OWCP for Longshore and Harbor Workers' Compensation, and James DeMarce, Executive Assistant to the Director 1164

STATEMENTS

American Insurance Association, Robert W. Flockhart, counsel, prepared statement 1058

Associated General Contractors of America, Robert Massman, construction contractor, representing the, prepared statement 927

Eblen, Frank L., vice president, Johnson & Higgins, prepared statement 961

Erlenborn, Hon. John, a Representative in Congress from the State of Illinois. 968

Prepared statement 974

Chamber of Commerce of the United States, prepared statement (with attachments) 1124

Collyer, Hon. Robert B., Deputy Under Secretary, Employment Standards Administration, Department of Labor, accompanied by Ralph M. Hartman, Director, Office of Workers' Compensation Programs; Neil Montone, Associate Director of OWCP for Longshore and Harbor Workers' Compensation, and James DeMarce, Executive Assistant to the Director 1164

Prepared statement 1169

East, Hon. John P., a U.S. Senator from the State of North Carolina, prepared statement 1035

Federal Administrative Law Judges Conference, Benjamin G. Usher, president, prepared statement 1102

Gardner, William L., Esq., representing Braswell Shipyards, Inc., S.C., accompanied by James Braswell, vice president, Braswell Shipyards, and Rick Meitzler, safety director, Braswell Shipyards; R. A. (Red) Osborn, Jr., Esq., representing the National Association of Manufacturers and the New Orleans Steamship Association, accompanied by Daniel Vannoy, director, product liability and employee compensation systems for National Association of Manufacturers; William H. Taylor, Esq., representing National Steel & Shipbuilding Co., a panel 26

Prepared statement 31

Page

Georgine, Robert, president, Building and Construction Trades Department, AFL-CIO, prepared statement 998

Guillen, Frank, welfare officer, local 9, of the Industrial Union of the Marine & Shipbuilding Workers of America, accompanied by Tom Perry, counsel; Jim Harmon, executive secretary; and Kevin Sullivan; and John J. Sheehan, legislative director, United Steelworkers of America, accompanied by John Hower, subdistrict director, Virginia area; Carl Hall, chairman, Tenneco local union, Newport News, Va.; David Demilano, Washington staff 661

Hood, Edwin M., president, Shipbuilders Council of America, accompanied by Bill Welch, chairman, workers' compensation committee; Stephen B. Clarkson, Stewart E. Niles, Jr., and Junius C. McElveen, Jr., special counsel 735

  Prepared statement 737

Huff, William H., III, senior vice president and general counsel, Employers Insurance of Texas, accompanied by Pat Whatley, associate actuary, and Roy Moore, manager, maritime claims; William Lachner, vice president, special risk facility, Insurance Company of North America; James F. Hughes, vice president, Midland Insurance Co., New York 112

  Prepared statement (with attachments) 115

Independent Insurance Agents of America, Inc., Paul D. Snodgrass on behalf of, prepared statement 946

Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO, Earl W. Barnes, regional director, prepared statement 1082

Insurance Company of North America, William E. Lachner, vice president, prepared statement 146

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO, Page Groton, assistant to the international president, prepared statement 1025

International Longshoremen's Association, AFL-CIO, Thomas W. Gleason, international president, prepared statement (with attachments) 355

International Longshoremen's & Warehousemen's Union, prepared statement (with attachments) 504

Leavitt, Bert J., president, Leavitt Insurance Agency, Las Vegas, Nev., chairman, National Insurance Producers Conference, and president, National Association of Professional Insurance Agents; Frank L. Eblen, vice president, Johnson & Higgins, New York, N.Y., and member, National Association of Insurance Brokers, Inc.; Howard J. Cornay, Jr., senior vice president, Bayly, Martin & Fay, Inc., Lafayette, La., and member, National Association of Casualty & Surety Agents; Paul D. Snodgrass, Ralph W. Lee & Co., Washington, D.C., president, Metropolitan Washington Independent Insurance Agents, and member, Independent Insurance Agents of America, Inc.; and Daniel J. Blum, president, Insurance House, Inc., Lafayette, La., and member, National Association of Professional Insurance Agents, a panel 942

Maisonpierre, Andre, senior vice president, Alliance of American Insurers, accompanied by Roy Kallop, vice president and actuary, National Council on Compensation Insurance; Robert W. Flockhart, counsel, American Insurance Association; and Howard Bunn, vice president for workers' compensation, National Association of Independent Insurers, a panel 1037

  Prepared statement 1040

Master Contracting Stevedore Association of the Pacific Coast, Inc., Dennis Lindsay, counsel, prepared statement 306

McElveen, Junius C., Jr., Esq., on behalf of the Shipbuilders Council of America, prepared statement (with attachments) 855

Metal Trades Council of New London County, Groton, Conn., Thomas Kiddy, president, prepared statement 1149

Midland Insurance Co., James F. Hughes, vice president, prepared statement 158

National Association of Casualty & Surety Agents, Gerald K. Cassidy, president, prepared statement 1122

National Association of Independent Insurers, Howard Bunn, vice president for workers' compensation, prepared statement 1065

National Association of Insurance Brokers, prepared statement 957

National Association of Manufacturers and the New Orleans Steamship Association, R. A. (Red) Osborn, Jr., representing the, prepared statement 90

National Association of Professional Insurance Agents, Bert J. Leavitt, president, prepared statement 1106

National Insurance Producers Conference, Bert J. Leavitt, chairman, prepared statement 1096

Page

- Niles, Stewart E., Jr., special counsel for the Shipbuilders Council of America, prepared statement (with attachments) 814
- North Atlantic Ports Association, Inc., William J. Torpey, president, prepared statement 1093
- Nunn, Hon. Sam, a U.S. Senator from the State of Georgia 17
- Potter, William H., president and treasurer of Fairhaven Marine, Inc., Massachusetts, representing American Boat Builders & Repairers Association, Inc.; John Buursema, president of Twin City Shipyard, St. Paul, Minn., representing American Waterways Shipyard Conference; and Robert J. Massman, secretary of Massman Construction Co., St. Louis, Mo., a panel 909
- Power, Jay, legislative representative, American Federation of Labor and Congress of Industrial Organizations, accompanied by Larry Smedley, social security department, AFL-CIO; Frances Zwenig, legislative representative, Building and Construction Trade Department, AFL-CIO, accompanied by Donald Elisburg, former Assistant Secretary of Labor for Employment Standards; and Andre Abbott, international representative, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO, a panel 983
  - Prepared statement 986
- Reinsurance Association of America, James M. Shamberger, vice president, government relations, prepared statement 1098
- Shipbuilders Council of America, Stephen B. Clarkson, special counsel, prepared statement (with attachments) 747
- Smith, Hon. Samuel J., Chief Administrative Appeals Judge, Benefits Review Board, U.S. Department of Labor, accompanied by Brian Meyers, acting senior board attorney 167
  - Prepared statement 171
- Steiner, Robert N., assistant director, Port Department, New York, Port Authority of New York/New Jersey 224
  - Prepared statement 226
- Sullivan, Patrick J., legislative director, International Longshoremen's Association, Washington, D.C., accompanied by Joe Leonard; Michael Lewis, Washington representative, ILWU, accompanied by Bruce Krieger, welfare affairs, ILWU; and Bill Luch, ILWU Local 8, Portland, Oreg 350
- Taylor, William H., attorney at law, Taylor, Jones & Wilson, prepared statement (with attachments) 50
- United Steelworkers of America, John J. Sheehan, legislative director, prepared statement 704
  - Summary statement 721
- Wilcox, Thomas D., executive director and general counsel, National Association of Stevedores, accompanied by Arthur E. Erb, president, National Association of Stevedores; and Dennis Lindsay, Esq., representing Master Contracting Stevedore Association of the Pacific Coast, Inc 239
  - Prepared statement (with attachments) 242
- Williams, Hon. Harrison A., Jr., a U.S. Senator from the State of New Jersey, prepared statement 349

ADDITIONAL INFORMATION

Articles, publications, etc.:

- American Waterways Shipyard Conference, organizations of 918
- Brief directed at the Supreme Court in the case of *U.S. Industries/Federal Sheet Metal, Inc., et al.*, petitioners, v. *Director, Office of Workers' Compensation, U.S. Department of Labor, et al.*, respondent, brief of Ralph Riley, respondent 665
- Companies Out of the Shipbuilding/Ship Repair Business 1970-80 914

Communications to:

Nickles, Hon. Don, chairman, Subcommittee on Labor, from:

- Batson, Arthur E., Jr., vice president and secretary-treasurer, Industrial Union of Marine & Shipbuilding Workers of America, Washington, D.C., June 23, 1981 (with enclosures) 699
- Cochran, Hon. Thad, a U.S. Senator from the State of Mississippi, October 19, 1981 (with enclosure) 1233
- Galiher, Richard W. Jr., law offices of Galiher, Clarke, Martell and Donnelly, Washington, D.C., October 13, 1981 1227
- Gardner, William L., attorney at law, Floey, Hoag & Eliot, Washington, D.C., June 18, 1981 1091

Communications to—Continued Page
Nickles, Hon. Don, chairman, Subcommittee on Labor, from—Continued
Landess, Robert C., industrial commissioner, Iowa Industrial Commission, Des Moines, Iowa, June 12, 1981 1095
Turner, Richard W., attorney at law, Hamilton and Hamilton, Washington, D.C., October 14, 1981 1231
Questions and answers:
Responses of Thomas D. Wilcox, executive director and general counsel, National Association of Stevedores, to questions asked by Senator Williams 296
Responses of William H. Taylor, Esq., attorney, representing the National Steel & Shipbuilding Co., to questions asked by Senator Williams 79
Responses of Robert N. Steiner, assistant director, Port Department, Port Authority of New York/New Jersey, to questions asked by Senator Williams 232
Responses of Dennis Lindsay, Esq., attorney, representing the Master Contracting Stevedore Association of the Pacific Coast, Inc., to questions asked by Senator Williams 327
Responses of Stephen B. Clarkson, attorney, representing the Shipbuilders Council of America, to questions asked by Senator Williams 807
Responses of Andre Maisonpierre, senior vice president, Alliance of American Insurers, to questions asked by Senator Williams 1053
Responses of R. A. Osborn, Jr., legal counsel, representing Atlantic and Gulf Stevedores, Inc., to questions asked by Senator Williams 105
Selected charts:
Increase in claims and benefit levels since 1972 amendments to the Longshore Act, from the U.S. Department of Labor 14
LHWCA benefit increases have far outpaced the growth of related economic indices, from the U.S. Department of Labor 15
Longshore Act Program—Second Injury Case Growth—Section 8(f) 1216
Longshore cost promotes diversion of U.S. cargo, from the U.S. Department of Commerce 16

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1981

TUESDAY, JUNE 16, 1981

U.S. Senate,
Subcommittee on Labor,
Committee on Labor and Human Resources,
Washington, D.C.

The subcommittee convened, pursuant to notice, at 9:30 a.m., in room 4232, Dirksen Senate Office Building, Senator Don Nickles (chairman of the subcommittee) presiding.

Present: Senators Nickles and Hawkins.

Opening Statement of Senator Nickles

Senator Nickles. Good morning.

Today is the first of 3 days of hearings on the Longshoremen's and Harbor Workers' Compensation Act, and legislation that Senator Sam Nunn and I have proposed to amend Senate bill 1182.

When the act was first amended in 1972, it became a free ticket to rip off the consumer and taxpayer. So much so that in the 5 years after the changes were made, reported injuries jumped 185 percent. The chart to my right clearly shows that as benefits skyrocketed, the number of claims shot up right along with them. In 1972, 72,000 claims were filed. That number jumped to over 205,000 by 1977, meaning that nearly 1 in 5 employees filed a claim.

This act, in my opinion, has two fundamental problems; first, it is loaded with provisions that encourage fraud and corruption. Hearings before the Senate's Permanent Subcommittee on Investigations earlier this year, concluded that the act is abused by organized crime. Our first witness today, Senator Nunn, spearheaded the investigation on waterfront corruption. I am sure he will be able to shed more light on the subject today. Second, organized crime is attracted to the act because of its more-than-generous payouts as now provided.

I believe it is important to provide sound worker's compensation, but the Longshoremen's Act has become a national disgrace at a time when commonsense seems to be finding its way back into Government. Now is the time to revamp the act in line with commonsense policy.

There are many cases that describe the absurdity of the system, which would sound like horror stories to the average working man or woman, but are commonplace on our Nation's waterfronts.

Take one of the commonplace examples from Shippers Stevedoring Co. in Houston. One of their longshoremen injured his right forearm on the job in May of last year. Because of his $33,000 annual salary, he automatically received about $426 a week in tax-free compensation—which was the maximum at that time. They paid him for nearly a year, and he received a total of over $18,500. In addition to that, the man's doctor said the employee would have a 25-percent impairment for the next 61 weeks, and the company was forced to pay an additional $26,000 during that time. So the company paid a total of nearly $45,000 in 1 year, all of which was tax free.

But that is not all. While he was receiving the additional $26,000 because of his impairment, he was also working in another job and was earning about $25,000. The total two salaries, or the money that he made that year, exceeded $70,000 a year, $45,000 of which was tax free.

You can see by this graph that benefit increases in the act have far outstripped the growth of related economic indexes. In many cases, the benefits often exceed an employee's preinjury take-home pay. This is ludicrous, and goes way beyond the intent of worker's compensation.

The benefits under the Longshoremen's Act have increased 551 percent from the period 1972 to the present. Benefits in 1972 were $70; present matching benefits, $456—an enormous increase. At the same time, the cost of living increased 97 percent; the CPI index and the national average weekly wage also had enormous increases.

The act also includes an unlimited, annual, tax-free escalation of disability benefits; an "unrelated death benefits" clause—meaning, for example, that if a person receiving disability benefits dies from a cause unrelated to his employment or injury, like an automobile accident, his survivors receive benefits—often more than the deceased could have received had he lived; injured employees may choose their own doctors for verifying injury claims; mandatory rehabilitation is not required, and all filed claims are presumed to be valid.

Coming from managing a small business in Oklahoma, where I was directly involved in worker's compensation administration, I am appalled that the Longshoremen's Act has been allowed to flourish unabated.

Last week, the New York Times published an editorial calling for changes in the act; citing the shipbuilding industry, where insurance costs have increased ninefold since 1970. In fact, according to recent statistics, for every $100 in salaries, employers are compelled to pay an additional $87.24 in compensation costs—this is in New York.

These outrageous costs are passed on to the shippers and three things are happening as a result.

First, as you can see in this diagram, many shippers are avoiding U.S. ports where they can, primarily working through Canadian ports where compensation costs are about $5 for every $100 in salaries. This needs to be compared to what they are in New York. For example, in the chart, it shows St. John, New Brunswick, where the rates presently are $3.40 per $100 of compensation. Compare that to only 400 miles south, in New York, the rates are $87. So if my math is somewhat correct, we are looking at almost

30 times the rate in New York for compensation costs as compared to what it is in Canada.

It is little wonder that shippers would go that 400 miles to save on such a tremendous burden. And for those who are not familiar with workers' compensation, when we talk about $87 per $100 of payroll, we are talking about if the employer pays an individual $20,000, he has to pay $16,000 to $17,000 in workers' compensation costs. We are saying 87 percent of compensation has to be paid in workers' compensation premiums.

Over 7 million tons of cargo were diverted through Canada in 1976 through 1979, which amounted to a little over $9 billion. Mexico will soon be in the business, as they are also building and expanding their ports.

Second, and very importantly, when business is diverted out of this country, jobs are lost. Entire companies can go out of business, and the whole Nation suffers as a result.

Another example of the act's depressive effects is here, in Washington, D.C., where all private employees are covered by the act. It is estimated that for every mile of track laid in the D.C. Metro system, employers paid $1.9 million in workers' compensation. Compensation rates in the District are several times higher than in neighboring Maryland or Virginia, even though this country has one of the cleanest records of work-related injuries and illnesses. If every State's compensation program was operated like this, few businesses would be able to survive.

Third, all consumers are affected by the act. It is estimated that Longshore compensation costs can push up the wholesale price of an item by as much as 25 percent. Every additional cost is passed directly to you and me. The Government has turned its back on every consumer by not acting to correct the injustices in the act.

The act must be amended for purely economic reasons. My criticism is directed at the Government for allowing the act to mushroom beyond original intent, and against those groups or individuals who abuse the law for personal benefit. The legislation under consideration would help restore balance by removing obvious inequities, significantly reduce fraud and corruption, aid ailing U.S. port authorities, and assure prompt delivery of generous compensation benefits and medical treatment to those deserving injured employees.

[The text of S. 1182 and graphs referred to follow:]

[From the Congressional Record--Senate--May 14, 1981]

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

* * * * * * *

By Mr. NICKLES (for himself and Mr. NUNN):

S. 1182. A bill to amend the Longshoremen's and Harbor Workers' Compensation Act to revise the manner of computing the benefits provided under such act, to provide for certification of physicians eligible to provide medical care to workers covered by such act, to provide for an attorney to serve as the representative of the special fund established under such act, to establish a Benefits Review Board the members of which are appointed by the President, to establish an advisory committee to evaluate the manner in which the provisions of the act are carried out, and for other purposes; to the Committee on Labor and Human Resources.

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1981

Mr. NICKLES. Mr. President, the Subcommittee on Labor, of which I am the chairman, of the Committee on Labor and Human Resources, has jurisdiction over the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. section 901 et seq. Senator NUNN and myself are introducing legislation today to correct the inequities of the Longshore Act's costly and confusing 1972 amendments. The Longshore Act is a federally mandated workers' compensation program which is administered by the Department of Labor but paid for by the private sector.

I would like to refer to the following words from the Supreme Court to describe why the Longshore Act was originally enacted in 1927 and how it came to be amended in 1972:

> Convinced that the only way to provide workmen's compensation for longshoremen and harborworkers injured on navigable waters was to enact a federal system, Congress, in 1927, passed the LHWCA.
>
> The Act was, in a sense, a typical workmen's compensation system, compensating an employee for injuries "arising out of and in the course of employment." But it was designed simply to be a gapfiller—to fill the void created by the inability of the states to remedy injuries on navigable waters. Thus, it provided coverage only for injuries occurring "upon the navigable waters of the United States" and permitted compensation awards only "if recovery . . . through workmen's compensation proceedings [could] not validly be provided by state law."
>
> * * * * *
>
> The 1972 Amendments were the first significant effort to reform the 1927 Act and the judicial gloss that had been attached to it. The main concern of the Amendments was

> not with the scope of the coverage but with accommodating the desires of three interested groups: (1) ship owners who were discontent with the decisions allowing many maritime workers to use the doctrine of "seaworthiness" to recover full damages from shipowners regardless of fault; (2) employers of longshoremen who, under another judicially created doctrine, could be required to indemnify shipowners and thereby lose the benefit of the intended exclusivity of the compensation remedy; and (3) workers who wanted to improve the benefit schedule deemed inadequate by all parties. Congress sought to meet these desires by "specifically eliminating suits against vessels brought for injuries to longshoremen under the doctrine of seaworthiness and outlawing indemnification actions and 'hold harmless' or indemnity agreements [; continuing] to allow suits against vessels or other third parties for negligence [; and raising] benefits to a level commensurate with present day salaries and with the needs of injured workers whose sole support will be payments under the Act."—*Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977).

The 1972 amendments seemed to strike a balance among the needs of labor, management, and government. Specific language eliminated employer liability in third-party suits. Workers' compensation was reestablished as the employer's exclusive liability under the longshore program in return for increased compensation benefits. However, what was achieved was far from a balance. Concepts were introduced whose consequences were ignored, and in a flurry of last-minute activity in the waning days of the 92d Congress, provisions of mysterious origin somehow crept into the amendments. Among the results are excessive costs and litigation, uninsurability, more delays in claims handling, a one-sided administrative process, and abuse of the system.

Before I describe the specific ills of the present Longshore Act and how this legislation can help to cure those ills, I would like to review the basic objectives of any program of workers' compensation. They are: the payment of medical expenses and replacement of lost earnings stemming from a job-related injury, the return to productive employment, an exclusive no-fault liability of the employer and a minimum of litigation, the proper allocation of costs, and, in general, the achievement of all those objectives in the most efficient manner.

The Longshore Act, as presently written and administered, completely distorts these equitable and sound objectives and the reasons are clear.

The Longshore Act contains an unrealistic benefits structure which incorporates principles which do not belong in a workers' compensation program: life insurance, pension, supplemental income and punitive damages. This benefits structure invites abuse of the system, because benefits are high and easy to obtain. A recent Washington Star article calls the act "a license to steal." "Waterfront Hoods Got Help From Hill," April 13, 1981.

The 1972 amendments based benefits on double the national average weekly wage. The present maximum disability benefit is $456.24 per week tax free with an unlimited annual tax-free escalation. The 1972 amendments added the so-called unrelated death benefits—if a person receiving any disability benefits dies from a cause unrelated to his employment or his injury, the survivor(s) receives benefits. This is a life-insurance concept alien to workers' compensation. The 1972 amendments do not encourage the return to work. Mandatory rehabilitation is not required. Benefits often equal or exceed pre-injury take-home pay, adding to the disincentive to return to work.

The Longshore Act permits the pyramiding of benefits, to the extent that an employee may draw workers' compensation, social security disability and retirement benefits which when totaled often exceed the aftertax wages. This is another encouragement for abuse and overutilization of the system.

The Longshore Act, thanks also to the 1972 amendments, has no clear jurisdictional lines. In 1972 the jurisdiction was extended landward. Workers who are far from navigable waters and maritime activity and who could be adequately covered under State compensation systems have been declared to be covered under the Longshore Act. No one knows where Federal jurisdiction stops and State jurisdiction begins, a situation which has bred costly and unnecessary litigation. Because of that, the Department of Labor has stated that it has an obligation to extend coverage to as many persons as possible even though they are already protected by adequate State compensation laws.

As just one example of expanded jurisdiction, I would like to point out that all private employees in the District of Columbia are presently covered under the Longshore Act. The District of Columbia was dumped under the act in 1928 because it was not a State and did not have its own workers' compensation system. Due to the 1972 amendments, workers compensation rates in the District are much higher than those in neighboring areas of Maryland and Virginia even though the District is one of the safest areas in terms of incidence of work-related injuries and illness. Firms are moving out of the District to the neighboring States and a significant factor is the unnecessary cost of workers' compensation. A recent Washington Post article had the following example, Washington business section, May 4, 1981:

> One trade association in D.C. with 45 employees estimated it could save more than $35,000 a year in workmen's compensation taxes by moving to Arlington.

It has been computed that for every mile of track laid for the District of Columbia Metro system, the employer paid $1.9 million in workers' compensation costs.

The unclear and confusing language of the Longshore Act and the lack of definition of relevant terms has moved the Supreme Court to remark that the act is "a jurisdictional monstrosity" and the Chief Justice to comment that it is "about as unclear as any statute could conceivably be."

Hearings on waterfront corruption in February of this year by the Senate Permanent Subcommittee on Investigations disclosed that not only does the act invite fraudulent and exaggerated claims but also organized crime. One of the recommendations that Senators NUNN and RUDMAN made at the conclusion of the hearings was that—

> The [Longshore] Act should be tightened to such an extent that it cannot be misused or abused by organized crime and labor racketeers to create a tool of economic extortion.

In 1976 the Waterfront Commission of New York issued a report on its findings of an elaborate workers' compensation fraud ring which caused workers' compensation costs in the Port of New York to be the highest in the country. They are still the highest—$87.24 per $100 of payroll for general stevedoring in New York. The racket included longshoremen-steerers, fraudulent injury claims, supported by false medical reports and inadequate supervision by the U.S. Department of Labor.

The 1972 amendments have flooded the system with a great increase in claims. According to Department of Labor figures, injuries reported under the Longshore Act—excluding the District of Columbia—jumped from 72,000 in 1972 to 205,500 in 1977, an increase of 185 percent. In contrast, during the years immediately preceding the amendments, claims dropped steadily from 96,900 in 1969 to 72,000 in 1972, a decrease of 25 percent. This surge in claims did not occur because the maritime industry became more dangerous in 1972. It occurred because under the 1972 amendments, benefits became far more generous and easier to obtain, and many more workers could qualify for them.

The 1972 amendments also created a two-step administrative appeal process within the Department of Labor, including a Benefit Review Board whose three members are appointed by the Secretary of Labor and serve at his pleasure. In addition, the Secretary's designee, Director, Office of Workers' Compensation Programs, appears as a litigant during the administrative appeals process and in appeals from Board decisions to the Federal courts. Thus, the Department is the judge, jury and prosecutor in litigation which essentially should involve only employer and employee.

As a result of all I have outlined, the employer's liabilities are virtually uninsurable, and where insurance is obtainable, it is almost unaffordable. Insurance companies and their reinsurers are withdrawing from the longshore market because of its unpredictability. Since no one knows who is covered under the act, or how much benefits will be escalated in the future, insurance companies and self-insurers cannot project their risk exposure.

Even with the exorbitantly high insurance premiums under the Longshore Act—according to a Government study, $50 per $100 of payroll is the nationwide average in the stevedoring industry, versus $1.50 per $100 of payroll for U.S. average workers' compensation—insurance companies are reluctant to underwrite the risk because no amount of premium can insure against the potentially high loss of an average case under the Longshore Act.

However, the costs of the act in order

for the employers to survive must be passed on to their customers and ultimately to the U.S. consumer. This increases the costs of American exports; adds significantly to the cost of shipping U.S. military cargo overseas; is a bonanza to the neighboring ports of Canada where workers' compensation costs are more realistic; and, in general, reduces America's competitiveness in international trade.

The exorbitant Longshore Act costs to American stevedores/employers undoubtedly have contributed to the ever-increasing amounts of American goods being diverted through Canadian ports, which causes a reduction in American waterfront jobs. A March 1981 study by the Maritime Administration stated that 2.1 million tons of U.S. cargo valued at $3.4 billion was diverted to Canadian ports, "U.S. Exports and Imports Transshipped Via Canadian Ports"—U.S. Department of Commerce Maritime Administration, Office of Market Development, March 1981.

The Mexican Government has recently constructed port and connecting rail facilities which also could enter the competition with Canada for American cargo and jobs, New York Journal of Commerce, May 6, 1981.

Mr. President, those are just some of the problems with the Longshore Act about which Congress has already heard. In addition to this year's Permanent Subcommittee on Investigations hearings there have been 23 days of Longshore Act oversight hearings which produced a hearing record in the House of over 3,000 pages in the 95th and 96th Congress and 477 pages in the Senate Committee on Labor and Human Resources in the 96th Congress. It is time for the Congress to act, and act effectively.

The legislation which Senator NUNN and I are introducing will help to restore balance to the system, remove obvious inequities, greatly reduce the incentive and opportunity for fraud and abuse, and assure the prompt delivery of generous compensation benefits and competent medical treatment to injured employees.

The bill does not roll back benefits or take compensation away from those now receiving it. It does place a 3-percent cap on the annual tax-free escalation for survivors benefits and permanent total disability compensation. It also defines what permanent total disability is. The present law does not.

The bill will eliminate unnecessary litigation and jurisdictional uncertainty by specifically defining those employees who are entitled to benefits for employment-related injuries or deaths. It replaces the undefined term "maritime employment" with specific definitions of "employer," "employee," "longshoreman," "shipbuilder," "shipbreaker," "ship repairman," and "harbor worker." It specifically defines those activities which are subject to the act's coverage and those employments which are not.

The bill removes the life insurance provision of the "unrelated death benefits." It also corrects an admitted and obvious drafting error by specifically providing that the survivor of a worker who dies from an employment-related injury will be subject to the same benefit limitation as the injured worker would have been. Under the present Longshore Act it is possible for the survivor to receive more in death benefits than the worker would have or was receiving in disability benefits.

The bill replaces the outmoded maximum benefit level of 66⅔ percent of the injured worker's gross wages with a maximum limitation of 80 percent of the worker's spendable earnings. This concept was recommended by the 1972 "Report of the National Commission on State Workmen's Compensation laws." The bill also eliminates the pyramiding of benefits by coordinating disability benefits so that the recipient of a combination of benefits will not receive more than 80 percent of his spendable earnings prior to the injury. This provision should restore the incentive for an injured worker to seek rehabilitation and to return to gainful employment. This bill will provide that, in keeping with the wage replacement concept of workers' compensation, compensation benefits will terminate when the employee reaches retirement age.

The bill will correct many administrative shortcomings and provisions which invite fraudulent and exaggerated claims. It eliminates the present free and unsupervised choice of physicians with a provision requiring the deputy commissioners to, by name, list a selection of qualified physicians. The bill would require supervision of medical treatment, prompt and accurate medical reports, and would suspend compensation payments to employees who unreasonably refuse to participate in rehabilitation programs. In addition, the bill increases from a misdemeanor to a felony the penalty for filing or making fraudulent statements in connection with compensation claims.

The bill improves the administration of the act by establishing the Benefits Review Board and administrative law judges as a tribunal independent of the Department of Labor. The members of the Board are to be appointed by the President for fixed terms with the advice and consent of the Senate. The Secretary of Labor and his designees will not participate in litigation before the Board. The bill increases the authority of the deputy commissioners within the Department of Labor to investigate claims, conduct hearings and make decisions which are final unless appealed by a party to the Board. The bill gives expanded settlement authority to the deputy commissioners. These features should improve the delivery of benefits to deserving employees and eliminate a substantial amount of the current unnecessary litigation.

Mr. President, these are the main features of the bill that we are introducing today, a bill which is fair and equitable to all parties concerned. My subcommittee will hold hearings in June and I hope that Congress will act promptly and enact these long overdue corrective measures. I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 1182

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) this Act may be cited as the "Longshoremen's and Harbor Workers' Compensation Act Amendments of 1981".

(b) Except as otherwise specifically provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Longshoremen's and Harbor Workers' Compensation Act.

SEC. 2. (a) Section 2(3) is amended to read as follows:

"(3)(A) The term 'employee' means any person who—

"(i) was employed as a longshoreman, ship repairman, shipbuilder, ship breaker, or harbor worker, and

"(ii) was directly engaged in activities relating to such employment and whose primary duties relate to such employment (as described under paragraphs (23) through (24)),

when the injury resulting in such person's disability or death occurred. Such term shall not include any person described under subparagraph (B) of this paragraph.

"(B) The term 'employee' shall not include any of the following individuals:

"(i) A master, or member of a crew, of any vessel.

"(ii) Any officer or other person employed by the United States or any agency thereof, by any State or foreign government, or by any political subdivision thereof.

"(iii) Any person who, at the time of injury, was engaged in administration, clerical, custodial, delivery, maintenance, or repair of gear or equipment, security, timekeeping, railcar loading and unloading, mechanical, truck loading or unloading, warehousing, or any other employments not direct and integral parts of vessel loading, unloading, repairing, building, or breaking.

"(iv) Any person who, at the time of injury, was providing services on or for any vessel less than sixty-five feet in length, but only if such person was covered by a State workers' compensation program at such time.".

(b) Section 2(4) is amended to read as follows:

"(4) The term 'employer' means any person who employs one or more employees.".

(c) Section 2(13) is amended to read as follows:

"(13) 'Wages' means the money rate at which the service rendered by an employee is recompensed by the employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 (relating to employment taxes).".

(d) Section 2 is amended by adding at the end thereof the following new paragraphs:

"(23) The term 'longshoreman' means any person engaged in the loading or unloading of cargo between (A) vessels upon the navigable waters of the United States and (B) the point of rest.

"(24) The terms 'ship repairman', 'ship builder', and 'ship breaker' mean any person engaged in the construction, repair, or dismantling of a vessel while such person is upon the navigable waters of the United States or floating drydock thereupon, but not while such person is upon piers, wharves, building ways, marine railways, graving docks, shops, or any other facilities or areas over land customarily used in ship repairing, ship building, or ship breaking.

"(25) The term 'harbor worker' means any person engaged in the performance of services on or for a vessel while such person is upon the navigable waters of the United States, other than any person covered by a State workers' compensation law.

"(26) The term 'point of rest' means—

"(A) when used in connection with bulk, breakbulk, or other noncontainerized cargo, (i) the area on the terminal facility, pier, elevator, or wharf which is assigned for the receipt of inbound cargo from the vessel and from which inbound cargo may be delivered to the consignee, or (ii) the area which is assigned for the receipt of outbound cargo from shippers for vessel loading; and

"(B) when used in connection with containerized cargo, (i) the area on the pier, wharf, or terminal to which inbound cargo is immediately transported after the unloading of a vessel, or (ii) in the case of outbound cargo, the area from which containerized cargo is immediately transported to the vessel for loading.".

Sec. 3. (a) Section 3(a) is amended to read as follows:

"Sec. 3. (a) Compensation shall be payable under this Act in respect of the disability or death of an employee.".

(b) Section 3(b) is amended by striking out the word "solely".

(c) Section 3 is amended by adding the following new subsection at the end thereof:

"(e) Any person who makes a false statement upon an employment application concealing a medical condition shall be barred from receiving any compensation or benefits under this Act for any injury or occupational disease related to such concealed medical condition if—

"(1) the employee knowingly and willfully made a false representation as to his physical condition;

"(2) the employer relied upon the false representation and this reliance was a substantial factor in hiring the employee; and

"(3) there was a causal connection between the false representation and the injury.".

Sec. 4. (a) Section 6(b)(1) is amended to read as follows:

"(b)(1) Except as provided in subsection (c), compensation for disability or death shall not exceed an amount equal to the lesser of the following:

"(A) An amount equal to 80 per centum of the employee's spendable earnings.

"(B) An amount equal to 200 per centum of the applicable national average weekly wage as determined by the Secretary under subsection (b)(3).".

(b) Section 6(d) is amended by striking out "under this subsection" and inserting in lieu thereof "under subsection (b)(3)".

(c) Section 6 is amended by adding at the end thereof the following new subsections:

"(e) For purposes of this Act, the spendable earnings of an employee shall be the employee's average weekly wage computed in accordance with section 10 (and adjusted to the nearest whole dollar) reduced by the amounts required to be withheld from such wage under Federal and State tax laws. For purposes of the preceding sentence, the amounts required to be withheld shall be determined on the basis of the reasonable anticipated liability of the employee for tax for the taxable year in which such payments are made without regard to any deduction or credit, other than the deduction for personal exemptions under section 151 of the Internal Revenue Code of 1954 or under similar provisions of State law.

"(f) As soon as practicable after the date of the enactment of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1981, the Secretary shall publish in the Federal Register tables showing the amount of spendable earnings at various wage levels for both married and single employees, as determined under subsection (e) of this section in accordance with the withholding tax tables then in effect. Each January 1 thereafter the Secretary shall review such tables and revise them for that calendar year if there has been a change in the withholding tax tables or in the maximum weekly rate of compensation, and the Secretary shall publish such tables as so revised in the Federal Register.".

Sec. 5. (a) Subsections (b) through (f) of section 7 are amended to read as follows:

"(b) Within such reasonable time period as the deputy commissioner may specify after the date of the enactment of this subsection, each employer may submit to the deputy commissioner for the compensation district in which the place of business of the employer a list containing the recommendations of the employer of those physicians whom the employer considers suitable for designation by the deputy commissioner as authorized attending physicians under this Act. Within sixty days after the expiration of the period referred to in the preceding sentence, and after reviewing the recommendations submitted by employers, the deputy commissioner shall determine which of the physicians so nominated by employers are suitable for designation under this subsection from such list of physicians who are suitable for designation under this subsection, the deputy commissioner shall establish a listing (subdivided according to geographic regions to the extent appropriate) of those physicians who are authorized to provide medical services as attending physicians under this Act. In determining the number of physicians who should be authorized to provide such services within any area, the deputy commissioner shall take into account the number of competent and impartial physicians conveniently available to the community in which the medical service is required. Each employer shall post the names and addresses of all physicians including in the listing in such manner as to afford his employees reasonable notice thereof.

"(c)(1) An employee may choose as an attending physician any physician included under an applicable listing established by the deputy commissioner under subsection (b). If an employee is unable to select his own physician because of the nature of his injury, and if such injury necessitates that the employee obtain immediate medical treatment, the employer shall select a physician for the employee. An employee who requires immediate medical treatment, and who receives such treatment from a physician not authorized to provide such services under subsection (b), may continue to receive treatment from such physician unless the deputy commissioner determines otherwise under paragraph (2).

"(2) The deputy commissioner shall actively supervise the medical care rendered to injured employees, shall require periodic reports concerning such care, shall have authority to determine the necessity, character, and sufficiency of medical care rendered or to be rendered to injured employees, and may order a change of physicians or hospitals on his own initiative or at the request of the employer when he determines such change to be desirable in order to provide for effective medical care at a reasonable cost.

"(3)(A) An attending physician shall not refer an employee to a medical specialist or consultant physician unless the attending physician—

"(i) notifies the employer of the name and address of the medical specialist or consultant physician;

"(ii) provides to the employer and deputy commissioner a written statement of the reasons for the referral; and

"(iii) has transmitted a medical report to the employer and to the deputy commissioner not later than ten days after the date of the attending physician's first treatment of the employee.

"(B) The employer, its insurance carrier, or the employee shall not be liable for the expenses incurred as a result of a referral to any medical specialist or consultant physician unless—

"(i) the attending physician has complied fully with the requirements of subparagraph (A) of this paragraph; and

"(ii) the medical specialist or consultant physician furnishes a written narrative report to the employer and to the deputy commissioner within twenty-one days after the date of the first examination or treatment of the employee by such specialist or consultant physician.

"(d)(1) An employee shall not be entitled to recover under this Act any amount expended by him for medical or other treatment or services unless—

"(A) such treatment, if obtained from an attending physician, is obtained as provided under subsection (b)(1); and

"(B) written notice of such treatment or services is provided to the employer within ten days after the date of the first treatment or provision of services.

"(2) No employer or employee shall be liable to any physician for any claim for medical or surgical treatment provided to an employee unless the physician provides to the employer, the employee, and the deputy commissioner, with ten days after the date of the first treatment of the employee by such physician, a written report of the injury, and the treatment or services provided, on a reporting form prescribed by the Secretary. The provisions of this paragraph shall not be applicable with respect to the medical specialists or consultant physicians referred to in subsection (c)(3)(B)(ii).

"(3) If an employee at any time unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the deputy commissioner shall suspend the compensation proceedings. If compensation proceedings are suspended under this paragraph, the employer shall not be liable for penalties, attorneys' fees, or for compensation payments that would otherwise have been payable for the period of the suspension.

"(e)(1) The deputy commissioner shall designate, by medical specialty, physicians who shall be authorized to provide independent medical examinations in accordance with this subsection. The names of physicians so designated in the community or compensation district shall be made available to employees and employers through posting, or by any other appropriate means. When medical questions are raised in a case, the employer may require the employee to be examined by a physician authorized under this subsection and to obtain from such physician a report containing (A) his evaluation of the employee's physical impairment (determined in accordance with American Medical Association Guides to the Evaluation of Impairment), and (B) such other information as may be appropriate.

"(2) In the case of any employee who had an existing physical impairment or disability at the time of the injury for which the examination is requested under paragraph (1) (hereinafter in this paragraph referred to as the 'subsequent injury'), the physician conducting the independent examination shall, upon the request of the employer, submit a report to the employer, employee, and deputy commissioner stating—

"(A) whether at the time of the examination the employee has a permanent physical impairment or disability greater than that which existed before the subsequent injury; and

"(B) if the permanent impairment or disability is determined, under subparagraph (A), to be greater as a result of the subsequent injury, whether—

"(i) such impairment or disability is attributable only to the subsequent injury; or

"(ii) the permanent physical impairment or disability found at the time of the independent examination is the result of both the preexisting physical impairment or disability and the subsequent injury.

If the physician conducting the independent medical examination concludes that the permanent physical impairment or disability existing at the time of the examination is not due solely to the subsequent injury and is greater than the preexisting physical impairment or disability, the employer shall be entitled to the relief available under section 8(f) of this Act.

"(3) Any employer or employee dissatisfied with the report submitted under paragraph (2) may request a reexamination of the employee by one or more physicians authorized under paragraph (1). Upon the request of an employer or employee, the deputy commissioner shall order such reexamination unless he finds that it is clearly unwarranted. Such reexamination sha be completed within fourteen days after the date ordered unless the deputy commissioner finds that because of extraordinary circumstances a longer period is required. The deputy commissioner may charge the cost of any reexamination under this subsection to the employer (if the employer is a self-insurer), to the insurance company which is carrying the risk, or to the employee, in appropriate cases, or to the special fund established under section 44.

"(4) An employee shall submit to physical examinations required under subsection (e) at such place as the deputy commission may designate which is reasonable convenient for the employee. No physician selected by the employer, carrier or employee shall be present at or participate in any manner in such examination. However, the conclusions of such physicians as to the nature or extent of impairment or the cause of impairment shall be available to the examining physician unless otherwise ordered, for good cause, by the deputy commissioner. Proceedings shall be suspended for any period during which the employee may refuse to submit to examination under this subsection. The employer shall not be liable for penalties, attorneys' would otherwise have been payable for the period of the suspension.

"(f) All fees and other charges for medical examination, treatment, or service shall be limited to such reasonable charges as prevail in the community for such treatment, and shall be subject to regulation by the deputy commissioner.".

(b) Subsections (g) and (i) of section 7 of the Act are repealed, and subsection (h) is redesignated as subsection (g).

Sec. 6. (a) Subsections (a) and (b) of section 8 are amended to read as follows:

"(a) Permanent Total Disability.—Subject to the limitations of section 6(b)(1), in the case of total disability determined to be permanent, 80 per centum of the spendable earnings (as defined in section 6(e)) of the employee shall be paid to the employee during the continuance of such total disability, except that compensation paid to the injured emplfoyete shall be reduced by the amount of social security benefits received by such employee. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or the loss of any combination of two such body parts, shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases there shall be a determination of total disability only if the employee proves by substantial evidence that as a result of the injury he is permanently unable to earn any wages in any employment.

"(b) Temporary Total Disability.—Subject to the limitations of section 6(b)(1), in the case of total disability determined to be temporary, 80 per centum of the spendable earnings of the employee (as defined in section 6(e)) shall be paid to the employee during the continuance of the disability, except that such compensation shall not be paid after the employee attains the retirement age prevailing in the industry and geographical region within which the employee was employed at the time of the injury.".

(b)(1) Section 8(c) is amended by striking out "66⅔ per centum of the average weekly wages" and inserting in lieu thereof "80 per centum of the spendable earnings of the employee (as defined in section 6(e)), subject to the limitations of section 6(b)(1),".

(2) Section 8(c)(13) is amended to read as follows:

"(13) Loss of hearing: Loss of hearing shall be compensated according to the terms and conditions of this paragraph.

"(A) For compensation purposes losses of hearing due to industrial noise shall be confined to the frequencies of 500, 1000, and 2000 cycles per second. Loss of hearing ability for frequency tones above 2000 cycles per second are not to be considered as constituting disability for hearing.

"(B) The percent of hearing loss, for purposes of the determination of compensation claims for occupational deafness, shall be calculated as the average, in decibels, of the thresholds of hearing for the frequencies of 500, 1000, and 2000 cycles per second. Pure tone air conduction audiometric instruments, approved by nationally recognized authorities in this field, shall be used for measuring hearing loss. If the losses of hearing average 25 decibels or less in the three frequencies, such losses of hearing shall not then constitute any compensable hearing disability. If the losses of hearing average 92 decibels or more in the three frequencies, then the same shall constitute and be a total of 100 percent compensable hearing loss.

"(C) In measuring hearing impairment, the lowest measured losses in each of the three frequencies shall be added together and divided by three to determine the average decibel loss. For every decibel of loss exceeding 25 decibels an allowance of 1½ percent shall be made up to the maximum of 100 percent which is reached at 92 decibels.

"(D) In determining the binaural percentage of loss, the percentage of impairment in the better ear shall be multiplied by five. The resulting figure shall be added to the percentage of impairment in the poorer ear and the sum of the two divided by six. The final percentage shall represent the binaural hearing impairment.

"(E) Before determining the percentage of hearing impairment, in order to allow for the average amount of hearing loss from nonoccupational causes found in the population at any given age, there shall be deducted from the total average decibel loss, one-half decibel for each year of the employee's age over forty.

"(F) Notwithstanding any other provision of this article, no claim for scheduled income benefits shall be filed until the lapse of two full consecutive calendar months after the termination of exposure to harmful noise in employment. The time limitation for the filing of claims for occupational deafness shall not begin to run earlier than the day following the termination of such two-month period. The time for filing claim as provided under this paragraph shall be applicable not only in respect of the last employer, but also in respect of any prior employer who may have liability to pay compensation for the occupational deafness. For the purpose of this subsection, the use of hearing protectors shall not constitute termination of exposure to harmful noise in employment.

"(G) An employer, otherwise liable under this section, whose employment has contributed to any extent to the employee's occupational deafness shall be liable for the full extent of the deafness of the employee, unless such employer shall establish by competent evidence (including the results of a professionally controlled hearing test) the extent of the employee's deafness as it existed prior to exposure to harmful noise in the employer's employment. Upon such showing the employer shall be liable to the employee only for the proportion of the deafness attributable to the employment by him. An audiogram performed in accordance with the provisions of subdivision (c)(3) of this section shall be conclusive evidence of the amount of hearing loss sustained when the employee began employment, unless contrary audiograms made at that time are produced. An employer liable to the employee for the full extent of the employee's occupational deafness may implead, in a compensation proceeding on the employee's claim, any prior employer or employers in whose employment the employee had been exposed to harmful noise, and if it should be found that the impleaded employer would have been liable to the employee under this section, had the employee proceeded against him, under the claim being adjudicated, the employer held liable shall be entitled to an award against the impleaded employer. The impleading of an employer shall be accomplished by notice on a form prescribed by the Secretary. Such notice shall be sent to the impleaded employer and to the Deputy Commissioner. An award may be made in favor of the employer liable to the employee, and against the impleaded employer or employers, such award may be enforced in the same manner as awards to employees. The impleaded employer or employers shall bear equal shares with the employer of the employer's liability to the employee, unless the evidence warrants a different apportionment.

"(H) No consideration shall be given to the question of whether or not the ability of an employee to understand speech is improved by the use of a hearing aid.

"(I) No employer shall be liable for the payment of scheduled income benefits for occupational deafness unless the employee claiming benefits shall have worked for such employer in employment exposing the employee to harmful noise for a total period of at least ninety days.".

(3) Section 8(c) is amended—

(A) by redesignating sections 8(c)(21) and 8(c)(22) as sections 8(c)(22) and 8(c)(23); and

(B) by adding after paragraph (20) the following new paragraph:

"(21) Spine: In the absence of evidence of a herniated or ruptured disc 312 weeks of compensation.".

(4) Subsection 8(c)(22) (as redesignated by paragraph (3) of this subsection) is amended to read as follows:

"(22) Other cases: (A) Subject to the limitations of section 6(b)(1), in all other cases in this class of disability the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his wage earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, except that such compensation shall not be paid after the injured employee attains the retirement age prevailing in the industry and geographic region within which the employee was employed at the time of the injury.

"(B) If an employee suffers injuries to a body area enumerated under any of the preceding paragraphs of this subsection, the employee shall be required to seek compensation under any such applicable paragraph and shall not be eligible to receive any additional compensation under this paragraph.

"(C)(i) Notwithstanding the provision of any compensation order, the employer may (I) reduce the payment of compensation during any period in which the employee's actual wages in the same or other employment or his wage earning capacity (as defined in section 8(h)), have increased, or (II) suspend such payment during any period in which such wages are determined to equal or exceed his average weekly wages before the injury. An employer may not reduce or suspend payments under this subparagraph before the date on which the employer submits notice thereof to the deputy commissioner together with a detailed statement of reasons and relevant documentation pertaining to such action. Upon receipt of such notification, the deputy commissioner shall within thirty days review the action taken by the employer and shall either disapprove the action and require the payment to the employee of any compensation so withheld, or shall affirm the action (in whole or in part), modify the compensation order accordingly, and require the payment to the employee of any compensation withheld in excess of the amount permitted to be withheld under any action approved only in part. If the deputy commissioner fails to take action within thirty days as required under the preceding sentence, the reduction or suspension of payments by the employer shall be considered to be approved. Any party may submit a written request to the Board for a hearing before an administrative law judge to review the approval or disapproval of a reduction or suspension of compensation payments under this subparagraph.

"(ii) If the employee's actual wages or wage earning capacity (as defined in section 8(h)) decrease, solely as a result of the injury during any period to an amount less than the average weekly wage of the employee before the date of the injury, the employee may submit a written request to the deputy commissioner for a review of his compensation payment, provided such request for review is filed within one year after the employee incurs the decrease or within one year after the date of the last payment of compensation, whichever period is the shorter.".

(c) Section 8(d) is amended by striking out paragraph (3) thereof and redesignating paragraph (4) as paragraph (3).

(d) Section 8(e) is amended by striking out "In" and inserting in lieu thereof "Subject to the limitations of section 6(b)(1), in".

(e) Section 8(f) is amended by adding at the end thereof the following new paragraph:

"(3)(A) Upon the recommendation of any organization representative of the interests of employer and insurance carriers which (i) is formed for the specific purpose of designating a fund representative under this section, and (ii) is recognized for such purpose by the Secretary, there shall be designated by the Secretary an attorney to serve as the representative of the special fund under section 44 (hereinafter in this paragraph referred to as the 'fund representative'). The Secretary shall cause notice to be given to the fund representative whenever application for apportionment is made pursuant to paragraph (1) or (2) of this subsection, and whenever hearing or proceedings involving the fund are to occur.

"(B) The fund representative—

"(i) shall be a party in any case in which an application for apportionment of compensation is made pursuant to paragraph (1) or (2) of this subsection, and shall have the same rights in any such case as any other party under this Act, including the right to enter into settlement of any claims brought against the fund;

"(ii) may hire such medical and other experts and witnesses as may be appropriate to defend any claim against the fund, the expenses for which shall be payable from the fund; and

"(iii) may hire such additional professional and clerical staff as may be required to enable the representative to competently perform his duties under this paragraph.".

(f) Subsections (g) through (i) of section 8 are amended to read as follows:

"(g) COMPENSATION FOR EMPLOYEES UNDERGOING VOCATIONAL REHABILITATION.—An employee who as a result of injury is undergoing vocational rehabilitation for remunerative employment under the direction of the deputy commissioner as provided by section 39(c) of this Act, or with the approval of the employer, shall be entitled to receive continued temporary total or partial compensation during the period of such rehabilitation. No award for permanent disability may be entered before the deputy commissioner determines, or the employer and employee agree, that vocational rehabilitation is unnecessary or until after vocational rehabilitation has been completed. If an employee unreasonably refuses to undergo vocational rehabilitation, the employee shall not be eligible to receive compensation payments that would otherwise be payable for the period of such refusal.

"(h) The wage earning capacity of an injured employee in cases of partial disability under subsection (c)(21) or subsection (e) of this section shall be the salary, wages, and other remunerations the employee is able to earn. In no case shall such amount be less than the amount actually being earned by the employee, including earnings from sheltered employment. If an employee voluntarily limits his income, or fails to accept employment commensurate with his abilities, the wage-earning capacity of the employee shall be considered to be the amount which would have been earned if the employee did not limit his income or if the employee accepted appropriate employment. Whenever compensation is payable under subsection (c)(21) or under subsection (e) the burden shall be on the employee to establish that any wage loss for which compensation is sought is the result of the compensable injury. For the purpose of this section, the term 'other remunerations' does not include indirect benefits or employee fringe benefits.

"(i)(1) No settlement agreed to by an employee and by the employer, the insurance carrier, or both, shall discharge the liability of an employer or insurance carrier for benefits for disability or death under this Act unless an application for approval of the settlement is approved by the deputy commissioner. Any settlement approved under this subsection shall have the same effect as a compensation order. Notwithstanding sections 15 and 16 of this Act, whenever an application for approval of such settlement is submitted, the application shall be considered to be approved, and the liability of the employer or the insurance carrier for benefits shall be discharged, unless the deputy commissioner, within thirty days after the date of the receipt of the application, disapproves the settlement by issuing a written statement containing the reasons and explanation thereof for disapproval. No settlement shall be disapproved unless the deputy commissioner finds it to be grossly inadequate or procured by duress.

"(2) If the deputy commissioner disapproves an application under paragraph (1), any party to the settlement may submit to the Board a request for a hearing limited to a determination of whether the disapproval of the application by the deputy commissioner was based on valid, substantial reasons. Any request for a hearing under this paragraph shall be in writing, and shall be transmitted to the Board by certified mail. Such hearing shall be held before an administrative law judge, designated by the Chairman of the Board, within thirty days after the date on which the hearing is requested, and an order approving, rejecting, or modifying the deputy commissioner's action shall be issued within thirty days after the date of the completion of the hearing. Any such order shall be appealable in accordance with the provisions of section 21(b).

"(3) Under the terms of a settlement as referred to in paragraph (1), the liability of the employer for any benefit under this Act for disability or death, or any part of such liability, may be discharged by the payment of a lump sum equal to the present value of the agreed-upon future compensation or death benefit payments commuted under the settlement, computed at the annually compounded discount rate prevailing at the time of settlement in the city in which the headquarters of the applicable Compensation District is located. No application for approval of a settlement providing for a lump-sum payment (as described under this paragraph) shall be approved by the deputy commissioner unless the lump sum agreed upon by the parties to the settlement was determined on the basis of all relevant factors, including the probability of death, remarriage, or any other contingency which might reasonably affect the amount or duration of future compensation or death benefits.".

(g) Section 8 is amended by adding at the end thereof the following new subsection:

"(j) Entitlement to compensation for disease alleged to be derived in any part from the claimant's occupation shall be determined by application of the substantive workers' compensation law of the State in which the last exposure to the disease producing or aggravating stimulus occurred.".

SEC. 7. (a) The matter preceding paragraph (a) of section 9 is amended by striking out ", or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury".

(b) The first sentence of section 9(b) is amended by striking out ": *Provided*, That the total amount payable shall in no case exceed 66⅔ per centum of such wages." and inserting in lieu thereof "The total amount payable shall in no case exceed the maximum benefit for which an employee is eligible as determined under section 6(b)(1).".

(c) Section 9(c) is amended by striking out ": *Provided*, That the total amount payable shall in no case exceed 66⅔ per centum of such wages." and inserting in lieu thereof "The total amount payable shall in no case exceed the maximum benefit for which an employee is eligible as determined under section 6(b)(1).".

(d) Section 9(d) is amended—

(1) by striking out "66⅔ per centum of the average wages of the deceased" and inserting in lieu thereof "the maximum benefit for which an employee is eligible as determined under section 6(b)(1)"; and

(2) by striking out "66⅔ per centum of such wages" and inserting in lieu thereof "the maximum benefit for which an employee is eligible as determined under section 6(b)(1)".

(e) Section 9(e) is amended to read as follows:

"(e) In computing death benefits, the average weekly wages of the deceased shall be considered to have been not less than the national average weekly wage as prescribed in section 6(b), but the total weekly benefits shall not exceed the lesser of the average weekly wages of the deceased or the maximum benefit which an employee is eligible to receive under section 6(b)(1).".

SEC. 8. Subsections (a) through (e) of section 10 are amended to read as follows:

"(a) If the injured employee worked during substantially the whole of the year immediately preceding his injury in the same employment in which he was working at the time of injury, whether for the same or another employer, his average weekly wage shall be one fifty-second part of the total wages earned by him in such employment.

"(b) If the injured employee worked during substantially the whole of the year immediately preceding his injury for the same or another employer in employment other than that in which he was working at the time of the injury, his average weekly wage shall be one fifty-second part of his actual earnings in such year. In no case shall the average weekly wage determined pursuant to this subsection exceed one fifty-second part of the average total wages earned by other employees in the same or neighboring locality working in employment of the same (or most similar) type as the employment in which the employee was working at the time of the injury.

"(c) If the injured employee did not work during substantially the whole of the year preceding the injury, his average weekly wages shall be his actual earnings for the year preceding his injury divided by the number of weeks in which he had any earnings. In no case shall the average weekly wage determined pursuant to this subsection exceed one fifty-second part of the average total wages earned by other employees in the same or neighboring locality working in employment of the same (or most similar) type as the employment in which the employee was working at the time of the injury.".

(b) Section 10 is further amended—

(1) by striking out subsections (d), (e), and (g), and by redesignating subsections (f), and (h) (and any references thereto) as subsections (d) and (e); and

(2) by amending subsection (d) (as so redesignated) to read as follows:

"(d) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after the date of enactment of this subsection shall be increased—

"(1) by a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 6(b), exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1; or

"(2) by 3 per centum;

whichever percentage is less.".

Sec. 9. Section 12(d) 1 amended to read as

Sec. 9. Section 12(d) is amended to read as follows:

"(d) Failure to give such notice shall bar any claim under this Act unless the employer had actual knowledge that the injury or death is, or is claimed to be, employment related.".

Sec. 10. (a) Section 14(b) is amended by striking out "knowledge of the injury or death" and inserting in lieu thereof "actual knowledge that the injury or death was, or is claimed to be, employment related".

(b) Section 14(d) is amended by striking out "has knowledge of the alleged injury or death" and inserting in lieu thereof "receives the notice of the filing of the claim from the deputy commissioner under section 19(b)".

(c) Section 14(f) is amended to read as follows:

"(f) If any compensation payable under the terms of an award is not delivered to the employee, or is not mailed postage prepaid to the employee, within fifteen days after the date the notice of award from the deputy commissioner is received by the employer, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation. No such penalty shall be required to be paid if—

"(1) the employer submits to the Board a request for a review of the compensation order as provided under section 21; and

"(2) the employer pays all periodic payments due the employer pursuant to the award for the period commencing on the date the award was entered and ending on the date review proceedings concluded.".

(d) Section 14(g) is amended by striking out "sixteen" and inserting in lieu thereof "thirty".

(e) Section 14 is amended by striking out subsections (h) and (j) and by redesignating subsections (i), (k), and (l) (and any references thereto) as subsections (h), (i), and (j), respectively.

(f) Section 14 is amended by adding the following new subsections at the end thereof:

"(l) The total money allowance payable to or on behalf of an employee as compensation for any permanent partial disability under this Act shall in no event exceed in the aggregate the amount determined by multiplying the maximum compensation rate payable in accordance with section 6(b)(1) by 312.

"(m)(1) Subject to section 10(d) of this Act, in no event shall the total weekly money allowance payable to an employee or his dependent survivors—

"(A) as compensation for an injury or death under this Act,

"(B) as Federal old-age, survivors, and disability insurance benefits (42 U.S.C. 401, et seq.),

"(C) from employee benefit plans subject to the Employee Retirement Income Security Act of 1974 (29 U.S.C. 101, et seq.; 26 U.S.C. 401, et seq.) (computed weekly),

"(D) as compensation in the nature of an unemployment benefit, or

"(E) as compensation in the nature of any other workers' compensation benefit (computed weekly), exceed in the aggregate 80 per centum of the spendable earnings of the employee (as determined under section 8(e)) at the time of the injury, computed on the basis of any applicable tax rate then in effect.

"(2) In determining the amounts payable to an employee or his dependent survivors under subparagraphs (B) through (E) of paragraph (1), such amounts shall be determined without regard to any offsets (with respect to sums payable under this Act) which may be required to be made under the provisions of any law or contract governing the terms of the benefits as referred to under such subparagraphs.

"(3) Subject to paragraph (4) of this subsection, if the computation under paragraphs (1) and (2) indicate that an employee or his survivors receive in the aggregate from the benefits referred to under paragraph (1) an amount which exceeds 80 per centum of the spendable earnings of the employee (computed as provided under paragraph (1) and adjusted in accordance with section 10(d)), the amounts otherwise payable as compensation or death benefits under this Act shall be reduced by an amount equal to such excess.

"(4) If as a result of the reduction computed under this subsection an employee or his survivors do not receive in the aggregate from the benefits referred to under paragraph (1) an amount equal to the 80 per centum of the spendable earnings of the employee (computed as provided under paragraph (1) and adjusted in accordance with section 10(d)), the amounts payable as compensation or death benefits under this Act shall be increased accordingly upon the filing of a request for such increase to be submitted by the employee or his survivors pursuant to section 22.".

Sec. 11. (a) Section 19(a) is amended by adding at the end thereof before the period the following: "and to make such investigations as he considers necessary for such determinations regarding the claim".

(b) Section 19(c) is amended to read as follows:

"(c)(1) The deputy commissioner shall issue a preliminary ruling (containing his findings and recommendations) not later than one hundred and eighty days after the employee, employer, or insurance carrier notifies the deputy commissioner that—

"(A) the employee's medical condition has been certified as permanent and stationary by a physician treating or examining the employee; or

"(B) the employee has resumed employment of any type.

"(2) The preliminary ruling of the deputy commissioner shall be served on the parties personally, or by registered or certified mail. The deputy commissioner shall include with such ruling a statement notifying the parties of their right to appeal any findings or recommendations contained in the ruling by submitting to the Board, within thirty days after receipt of the ruling, a request for a hearing, together with notice of which findings and recommendations contained in the preliminary ruling shall be appealed.

"(3) If no request for a hearing is made under paragraph (2), the preliminary ruling of the deputy commissioner shall be considered to be a final order and shall not be subject to review under section 21 of this Act by any administrative law judge, by the Board, or by any court.".

(c) Section 19 is further amended by striking out subsections (d), (e), and (h), and by redesignating subsections (f) and (g) (and any references thereto) as subsections (d) and (e), respectively.

Sec. 12. Section 20 is hereby repealed.

Sec. 13. (a) Subsections (a) and (b) of section 21 are amended to read as follows:

"(a)(1) There is established a Benefits Review Board which shall be composed of three members appointed by the President, by and with the advice and consent of the Senate, from among persons who by reason of training, education, and experience are qualified to carry out the functions of the Board under this Act. The President shall designate one of the members of the Board to serve as Chairman.

"(2)(A) The terms of members of the Board shall be six years except that of the members first appointed (i) one shall serve for a term of two years, (ii) one shall serve for a term of four years, and (iii) one shall serve for a term of six years, as designated by the President at the time of appointment. A member of the Board may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

"(B) A vancancy in the Board shall be filled in the same manner in which the original appointment was made. Any member appointed to fill a vacancy occurring before the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term. A member may serve after the expiration of his term until his successor has taken office.

"(3)(A) The principal office of the Board shall be in the District of Columbia. Whenever the Board deems that the convenience of the public or parties may be promoted, or delay or expense may be minimized, it may hold hearings or conduct other proceedings at any other place.

"(B) Every official act of the Board shall be on the record, and its hearings and record shall be open to the public.

"(4) For the purpose of carrying out its functions under this Act, two members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members.

"(5) The Chairman shall be responsible

for carrying out the administrative duties of the Board, but may delegate such functions to any other member of the Board. The Chairman may appoint and fix the pay of such administrative law judges and other employees as he considers necessary to assist the Board in the performance of its functions. The assignment, removal, and compensation of administrative law judges shall be in accordance with sections 3105, 3344, 5372, and 7521 of title 5, United States Code.

"(6)(A) The Board may, for the purpose of carrying out its duties under this Act, hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Board considers appropriate. The Board may administer oaths or affirmations to witnesses appearing before it, and may order testimony to be taken by deposition in any proceedings pending before it at any time during the proceedings. Witnesses whose depositions are taken under this paragraph, and the persons taking such depositions, shall be entitled to the same fees as are paid for comparable services in the courts of the United States.

"(B) The Board may issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation by the Board. Such attendance of witnesses and the production of such evidence may be required from any place within the United States at any designated place of hearing within the United States. The subpenas of the Board shall be served in the manner provided for subpenas issued by a United States district court under the Federal Rules of Civil Procedure for the United States district courts.

"(b)(1)(A) If a request for a hearing to review any determination of the deputy commissioner is submitted to the Board in accordance with this Act, the Board shall provide the parties with an opportunity for a hearing on the record before an administrative law judge designated to hear and determine the case by the chairman of the Board. Any such hearing shall be conducted in accordance with section 554 of title 5, United States Code. Within thirty days after the hearing is concluded, the administrative law judge shall, by order, make an award for compensation or shall reject the claim of the employee.

"(B) A compensation order issued by an administrative law judge shall become effective when filed in the office of the Board unless any party to the proceeding submits written notice to the Board and to the deputy commissioner appealing the order and requesting a hearing before the Board under paragraph (2). Any such notice of appeal may be submitted by a party not later than the thirtieth day after the date of the receipt of a copy of the order.

"(C) The payment of the amounts required by an award pursuant to an order of an administrative law judge, other than the periodic payment of compensation or death benefits, shall be stayed pending final decision in any review proceeding before the Board.

"(2)(A) Upon the filing of an appeal of any order issued by an administrative law judge under paragraph (1), the Board shall conduct proceedings to review such order whenever a substantial question of law or fact is raised by the party requesting the review. Actions in proceedings before the Board shall be taken in accordance with the Federal Rules of Civil Procedure to the extent that such rules may be applicable, unless the Board has adopted a different rule. The order of the Board shall be based upon the hearing record in such proceedings. The findings of fact and the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole.

"(B) A compensation order issued by the Board shall become effective when filed in the office of the Board unless any party to the proceeding files for a review of the order by a court in accordance with subsection (c).".

(b) Section 21(c) is amended by striking out the last three sentences thereof and inserting in lieu thereof the following: "Payment of the amounts required by an award, other than the periodic payment of compensation or death benefits, shall be stayed pending final decision in any such proceeding.".

(c)(1) Upon the appointment of members to the Board established by the amendment made to the Longshoremen's and Harbor Workers' Compensation Act by subsection (a) of this section, all officers, employees, assets, liabilities, contracts, property, and records of the Benefits Review Board in the Department of Labor shall be transferred to such Board. Until the date that all members are so appointed, the Benefits Review Board in the Department of Labor shall continue to function for the purpose of determining appeals from the orders of administrative law judges, and shall have during such interim period the authority provided to such Board under the amendment made by subsection (a) and by section 11 of this Act to designate administrative law judges to hear and determine appeals from rulings of the deputy commissioner.

(2) All orders, determinations, rules, regulations, grants, contracts, agreements, permits, licenses, privileges, and other actions which have been issued, granted, made, undertaken, or entered into in the performance of any function transferred under this subsection shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law by any authorized official, a court of competent jurisdiction, or by operation of law.

(3) No suit, action, or other proceeding lawfully commenced by or against the Board or any officer of the United States acting in his official capacity shall abate by reason of any transfer under this section.

Sec. 14. Section 21a is hereby repealed.

Sec. 15. Section 23 is hereby repealed.

Sec. 16. Section 24 is amended to read as follows:

"WITNESSES; AUTHORITY OF DEPUTY COMMISSIONER OF ADMINISTRATIVE LAW JUDGE

"Sec. 24. (a) No person shall be required to attend as a witness in any proceeding before a deputy commissioner or an administrative law judge at a place outside of the State of his residence and more than one hundred miles from his place of residence, unless his lawful mileage and fee for one day attendance shall be first paid or tendered to him; but the testimony of the claimant and any other witnesses may be taken at any time following the filing of a claim for compensation or death benefits by deposition or interrogatories according to the rules of practice of the Federal district court for the judicial district in which the injury occurred (or in the United States District Court for the District of Columbia if the injury occurred in the District).

"(b) on any matter within the jurisdiction of the deputy commissioner or an administrative law judge appointed by the Board, the deputy commissioner or such judge shall have the following authorities:

"(1) The deputy commissioner or administrative law judge may issue supenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation by the deputy commissioner or such judge. The subpenas shall be served in the manner provided for subpenas issued by a United States district court under the Federal Rules of Civil Procedure for United States district courts.

"(2) The deputy commissioner or administrative law judge may take such testimony, examine such witnesses, and receive such evidence as they consider appropriate to the proceedings conducted by them, and may require the production of books, papers, documents, and other evidence at any hearing or discover proceeding in a manner consistent with the Federal Rules of Civil Procedure. The deputy commissioner or such judge may administer oaths or affirmations to witnesses appearing before them.

"(c) If any person in proceedings before a deputy commissioner, administrative law judge, or Board disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same, or neglects to produce, after having been ordered to do so, any pertinent book, paper, or document, or refuses to appear after having been subpenaed, or upon appearing refuses to take the oath of a witness, or after having taken the oath refuses to be examined according to law, the deputy commissioner, administrative law judge, or Board shall certify the facts to the district court having jurisdiction in the place in which he is sitting (or to the United States District Court for the District of Columbia if he is sitting in such District) which shall thereupon in a summary manner hear the evidence as to the acts complained of, and, if the evidence so warrants, punish such person in the same manner and to the same extent as for a contempt committed before the court, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of or in the presence of the court.".

Sec. 17. Section 25 is amended by inserting "or administrative law judge" after "deputy commissioner".

Sec. 18. Section 27 is repealed.

Sec. 19. Section 28 is amended to read as follows:

"FEES FOR SERVICES

"Sec. 28. (a) No claim for legal services or for any other services rendered in respect of a claim or award for compensation, to or on account of any person, shall be valid unless approved by the Board, or if proceedings for review of the order of the Board in respect of such claim or award are conducted before any court, unless approved by such court. Any claim so approved shall, in the same manner and to the same extent fixed by the Board or such court, be a lien upon such compensation.

"(b) If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation on the ground that there is no liability for compensation within the provisions of this Act and the person seeking benefits shall thereafter utilize the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to a compensation order, a reasonable attorneys' fee against the employer and carrier for services rendered before the Board or reviewing court. Such fee shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

"(c) In no case other than as provided in subsection (b) of this section shall any claim for legal services rendered to any person seeking benefits or compensation according to the provisions of this Act be assessed against the employer or carrier.

"(d) Any person who receives any fees, other consideration, or any gratuity on account of services rendered as a representative of a claimant, unless such consideration or gratuity is approved by the Board or court, or who makes it a business to solicit employment for a lawyer, or for himself in respect of any claim or award for compensation, shall upon conviction thereof, for each offense be punished by a fine of not more than $1,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.".

Sec. 20. Section 30(f) is amended to read as follows:

"(f) Where the employer or the carrier has been given notice or has actual knowledge that injury to or death of an employee is claimed to be employment related and fails, neglects, or refuses to file report thereof as required by the provisions of subsection (a) of this section, the limitations in section 13(a) of this Act shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier, until such report shall have been furnished as required by the provisions of subsection (a) of this section.".

Sec. 21. Section 31 is amended to read as follows:

"PENALTY FOR MISREPRESENTATION

"Sec. 31. Any person who willfully makes any false or misleading statement or representation for the purpose of obtaining any benefit or payment under this Act shall be guilty of a felony, and on conviction thereof shall be punished by a fine not to exceed $50,000 or by imprisonment not to exceed 5 years, or by both such fine and imprisonment. The office of the United States attorney for the district in which the injury is alleged to have occurred, in conjunction with any appropriate Federal agency, including the Federal Bureau of Investigation, shall make every reasonable effort promptly to investigate each complaint."

Sec. 22. (a) Section 33(b) is amended by inserting", administrative law judge," before "or Board".

(b) Section 33(e) is amended by striking out "deputy commissioner or".

(c) Section 33(f) is amended to read as follows:

"(f)(1) If the person entitled to compensation institutes proceedings within the period described in subsection (b) of this section, the employer shall be required to pay as compensation under this Act a sum equal to any amount by which the amount which the Secretary determines is payable on account of such injury or death exceeds the amount recovered in such proceedings against any such third person.

"(2) Any amount recovered by the person entitled to compensation on account of such proceedings by judgment or settlement, whether or not the settlement is approved by the employer in accordance with subsection (g) of this section, shall be distributed as follows:

"(A) The person entitled to compensation shall pay to the employer an amount equal to the sum of—

"(i) the cost of all benefits furnished to him by the employer under section 7; and

"(ii) all other amounts payable as compensation or benefits under this Act.

"(B) The person entiled to compensation or his representative shall retain the balance of the amount.

"(3) The employer will receive credit for future compensation or medical benefits from the amount retained by the employee under paragraph (2)(B), before payment of attorneys' fees and expenses, and such credit shall be the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule provided by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 7, to be estimated by the deputy commissioner.".

(d) Section 33(g) is amended to read as follows:

"(g)(1) If the person entitled to compensation (or his representative) enters into a settlement with any third person referred to in subsection (b) for an amount less than the compensation to which such person or representative would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and its insurance carrier, before such settlement is executed, by the person entitled to compensation (or such representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after such settlement is entered into.

"(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any judgment obtained from a third person, and regardless of whether the employer or its insurer has made payments or acknowledged entitlement to the benefits of this Act, all rights to compensation under this Act shall be terminated.".

Sec. 23. (a) Section 39(c)(1) is amended by striking out ", upon request," and inserting in lieu thereof "not".

(b) After the date of the enactment of this Act, the Secretary shall be eligible to participate in proceedings relating to this Act which are before any court, as provided under section 21(c), only as an intervenor.

Sec. 24. Section 40(f) is amended by inserting between "deputy commissioner" and "or Board Member" the words ", administrative law judge," in both instances.

Sec. 25. Section 41 is repealed.

Sec. 26. Section 44(j)(2) is amended to read as follows:

"(2) under sections 8(f), (g), and (i), 10(e)(2), 18(b), 39(c)(2), and 53.".

Sec. 27. Sections 45, 46, and 47 are repealed.

Sec. 28. Section 49 is amended by inserting between the first and second sentences the following new sentence:

"The discharge or refusal to employ any employee who has filed a fraudulent claim for compensation shall not be a violation of this section."

Sec. 29. Nothing contained in the amendments made by this Act shall be construed to reduce the amount of any benefits being received under the Longshoremen's and Harbor Workers' Compensation Act by an individual on the date of the enactment of this Act.

Mr. NUNN. Mr. President, I join as cosponsor of the amendments to the Federal Longshoremen's and Harbor Workers' Act introduced today by the distinguished Senator from Oklahoma (Mr. Nickles).

As former chairman and now the ranking minority member of the Permanent Subcommittee on Investigations, I had the opportunity to oversee an extensive staff investigation of organized crime's influence on the American waterfront. Building on the successful labor racketeering (UNIRAC) investigation by the Department of Justice and the FBI, our staff interviewed numerous witnesses and reviewed countless items of evidence detailing organized crime's domination of not only the International Longshoremen's Association (ILA) but also large segments of the American shipping industry.

Based on that investigation, the subcommittee held nearly 3 weeks of public hearings last February on the subject of waterfront corruption. We were pleased at that time to have the presence and participation of both Senator Nickles and Senator Hatch. I believe that the introduction of these amendments is at least in part a response to the evidence of waterfront corruption presented during the course of our hearings.

Witnesses before the subcommittee confirmed time and again that a scenario of kickbacks and corruption exists on the American waterfront. We heard of illegal payoffs to union officials for a variety of reasons: To insure the award of work contracts, to maintain contracts already awarded, to insure labor peace, to allow management circumvention of labor strikes, to prevent the filing of fraudulent workmen's compensation claims, to expand business activity into new ports, and to accord certain companies the freedom to circumvent ILA contract requirements with impunity. We were told that the benefits of those payoffs flow directly and indirectly to recognized members and associates of traditional organized crime families.

Regarding the Federal Longshoremen's and Harbor Workers' Act, the evidence established that organized crime, through its manipulation of both the ILA and statutory loopholes in the act, operates and profits by a thriving fraudulent claims racket on the waterfront. We heard that the astronomical cost of fraudulent workmen's compensation claims has driven some stevedoring companies out of business, has rendered others literally uninsurable, and poses a continuing threat to the economic survival of many more. Moreover, the racket provides organized crime with economic leverage by which it can demand extortionate payoffs from members of the stevedoring business. The prosecution and conviction of Anthony Scotto in New York is but one glaring example of that fact.

Senator Rudman and I, in recommendations issued after the close of our hearings, strongly suggested that the Longshoremen's and Harbor Workers' Act be amended to prevent its fraudulent abuse by organized crime.

In that context, I welcome and encourage congressional action designed to rid the waterfront of the fraudulent claims racket. I recognise the bill which Senator Nickles proposes as one such effort. The bill is a comprehensive revision of the entire act, confronting many issues which were not part of the subject matter of our hearings. Some of those issues deal with specialized areas of expertise, such as compensation for hearing losses. Although I reserve judgment on these provisions, until the Congress has had the opportunity to study the matter, further, I strongly endorse and support several specific sections of the bill which directly deal with issues and problems covered during the course of our hearings on waterfront corruption.

I am supporting those provisions in the belief that they will help to effectively reduce any further fraudulent manipulation of our workmen's compensation laws on the waterfront. Specifically, I am referring to six separate sections of the proposed bill. The need for each of those sections has been amply established by testimony and evidence received during our February hearings.

Section 3 of the bill makes several changes in the current law. Its initial subsection is procedural in nature, merely conforming this section to the definitional scheme set forth in section 3 of the bill. Subsections (b) and (c), however, are designed to eliminate the number of fraudulent claims filed under the act. Subsection (b) tightens the restriction on payments of benefits where intoxication was a contributing factor in the injury. Particularly important is subsection (c), which bars the payment of benefits to any person who has made a false representation concealing a material medical condition in an employment application.

Section 5 of the bill is lengthy and detailed in scope. It strikes at the very heart of the fraudulent claims racket by revising the procedures for physician selection, reporting requirements for claims, examinations and reexaminations of questioned claimants and other medical evaluations designed to insure payment for valid claims only. Current law permits a free choice of physician by the employee.

Testimony during our hearings established that that procedure has repeatedly allowed those filing fraudulent claims to select doctors engaged in the racket. The bill provides that physicians be chosen from a list authorized by a deputy commissioner of the Department of Labor. That type of procedure should serve to insure the integrity of the treating physician.

Section 11 revises the current hearing procedure in order to facilitate the discovery of fraudulent claims. Especially important is subsection (a), providing the deputy commissioner with expanded investigative authority to fully examine the validity of a disputed claim. Our hearings disclosed that the Department of Labor has done little, if anything, to eliminate the fraudulent claims racket. Certainly this grant of investigative resources should serve to facilitate a more active role by the Labor Department in this area.

Section 12 repeals the current section 20 of the act, which establishes an automatic presumption of validity for any claim filed. Our hearings identified that presumption as one of the main factors contributing to the success of the fraudulent claims racket. Time and again we heard that the section 20 presumption presented a nearly insurmountable hurdle for an employer who attempts to dispute the validity of an apparently fraudulent claim.

Section 21 raises the criminal penalty for misrepresentation in the submission of a claim from a misdemeanor to a felony punishable by up to 5 years imprisonment, a fine of $50,000, or both. Again this change was specifically and repeatedly recommended and justified during the course of our hearings.

Lastly, section 28 amends the current antidiscrimination section of the act to prevent the levy of a penalty against an employer who dismisses an employee for the filing of a claim shown to have been fraudulent. As the act now stands, such an employer is subject to a penalty of up to $1,000 and reimbursement of lost wages of the employee. No distinction is currently made between the dismissal of an employee who had filed a valid claim and one who had filed an obviously fraudulent claim. The unfairness to the employer of the present provision is obvious.

I look forward to the upcoming hearings of the Labor Subcommittee, under Senator Nickles' chairmanship, in which all the remaining provisions of the bill, as well as the issues which they address, can be thoroughly explored with a view to final legislative proposals.

The facts are clear that significant and disturbing problems exist as a result of certain provisions of the Longshoremen's and Harbor Workers' Act. Hopefully, Congress will be able to act swiftly and effectively to correct those problems and to arrive at a statutory solution which will fairly serve the interests of both labor and management.

Mr. President, in closing, I wish to thank personally Senator Nickles for not only taking a lead in this area but for scheduling early hearings on an extremely important matter.

We have reached the point in several of the waterfronts that we investigated and perhaps in many more where free enterprise as we know it no longer exists on the waterfront because of the pervasive effect of corruption and the direct influence of organized criminal elements on both labor elements and business associations operating on the waterfront.

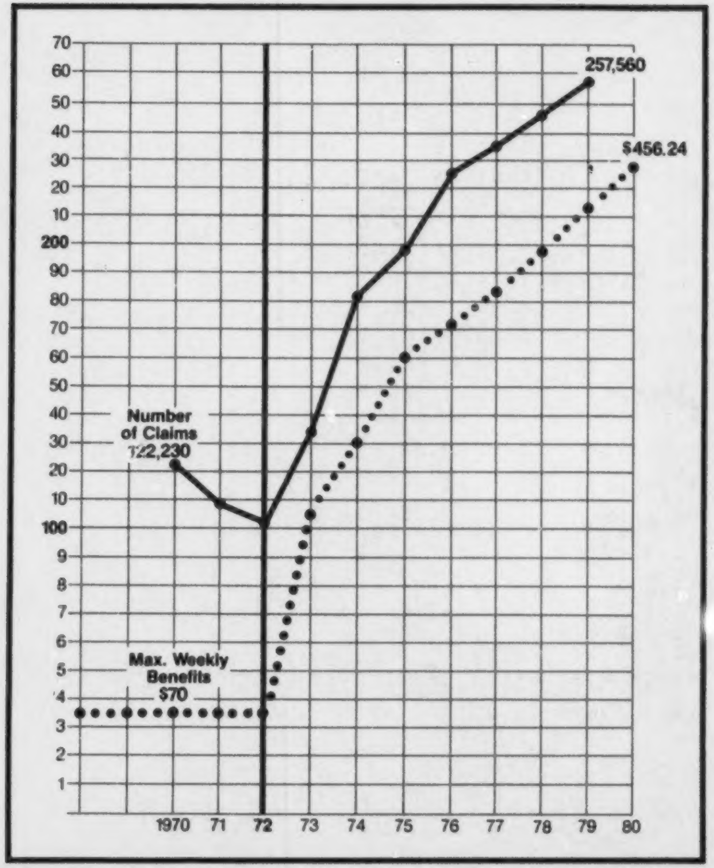
I also wish to commend Senator Hatch for allowing Senator Nickles to move forward with his subcommittee in this important area.

Both Senator Nickles and Senator Hatch attended several of our hearings and I think they saw during those hearings that this was not only a serious problem but an urgent problem that demanded the attention of Congress.

* * * * * * *

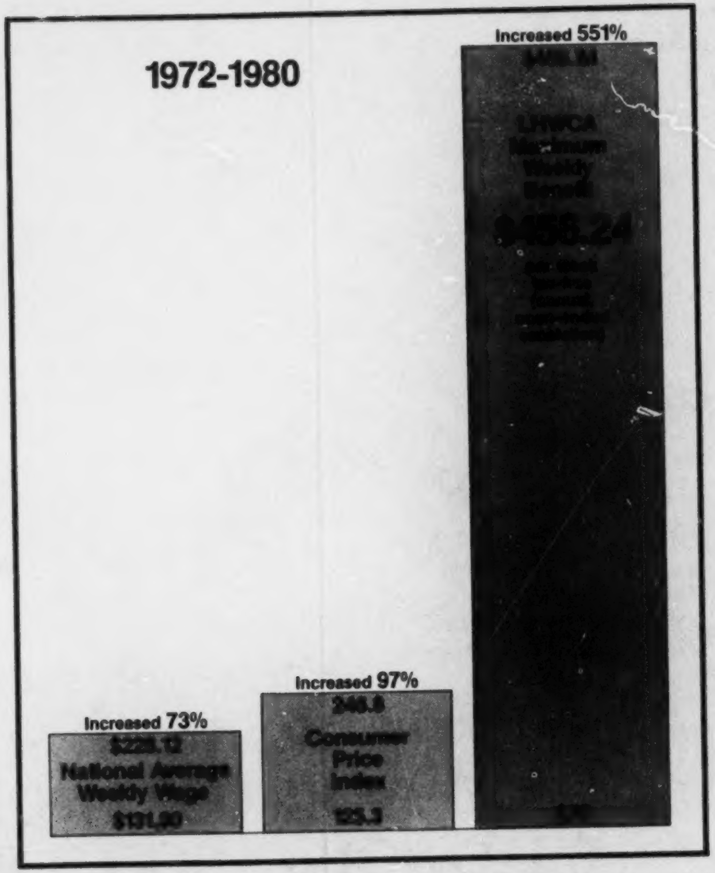
Increase in Claims and Benefit Levels since 1972 Amendments to the Longshore Act

Since 1972, number of employees covered increased from 700-800,000 to 905,000



Source: U.S. Dept. of Labor / Congressional Hearings

LHWCA Benefit Increases have far outpaced the growth of related economic indices



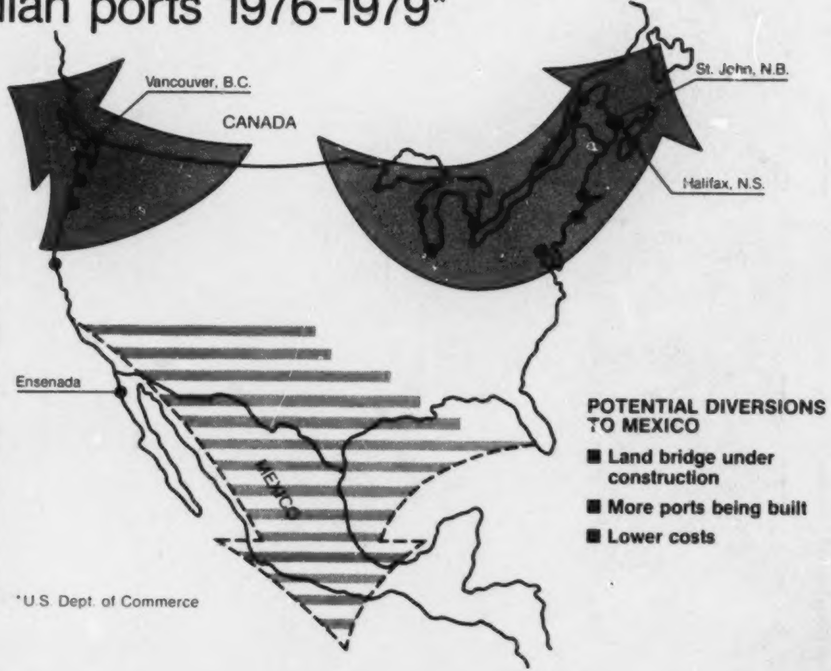
LONGSHORE COST PROMOTES DIVERSION OF U.S. CARGO

7.4 million tons ($9.4 billion) of cargo diverted via Canadian ports 1976-1979*

Approximate Workers' Compensation Costs as a Percentage of Payroll

Service Industries	0.5%
U.S. Average	1.5%
Manufacturing	3.5%
Carpentry	8.0%
Foundry	10.0%
Logging	18.0%
Steel Erection	45.0%
Longshoring	50.0%

Source Final Report of the Interagency Task Force on Workplace Safety and Health December 14 1978



POTENTIAL DIVERSIONS TO MEXICO

- ■ Land bridge under construction
- ■ More ports being built
- ■ Lower costs

*U.S. Dept. of Commerce

Senator NICKLES. Senator Nunn, it is a pleasure to see you here this morning. Your activities before your committee greatly spurred my interest in this act. I remember quite well the employer who stated that prior to 1972, his annual workmen's compensation premiums were something like $240,000; by 1974, they were $1.4 million. He said he was able to get those reduced by making payments under the table in cash to organized crime officials, and his premiums then dropped to the neighborhood of about $400,000. That threw water in my face. I knew, and had heard that it was bad, but I didn't know it was that bad until your committee conducted their hearings and opened up my eyes, and I think opened up the eyes of this country. I think you are to be complimented for your activity. I appreciate your cosponsoring this legislation, and I hope that we can work together to make the changes that need to be made. I appreciate your joining us this morning.

STATEMENT OF HON. SAM NUNN, A U.S. SENATOR FROM THE STATE OF GEORGIA

Senator NUNN. Thank you, Mr. Chairman.

I want to express my appreciation to you for having these hearings and also for participating in the hearings we had on the Permanent Subcommittee on Investigations along this overall line.

I am delighted to appear here this morning at the opening of the subcommittee's hearings on the proposed amendments to the Federal Longshoremen's and Harbor Workers' Act. S. 1182, which embodies those amendments which I cosponsored with you before the Senate on May 14, 1981, attempts to remedy serious and proven shortcomings in the present system of workmen's compensation for waterfront workers.

The bill deserves the full and careful consideration of this subcommittee as well as that of the entire Senate and Congress.

Mr. Chairman, you, as well as the full subcommittee and staff, are to be commended for your work not only in formulating that legislation but also in the prompt scheduling of these hearings.

I would like to take this opportunity to offer both my own comments as to my interest in this bill and also to offer a broader factual background which I believe supports and necessitates its passage by the Senate. I am going to refer, Mr. Chairman, with your permission, to some of the provisions in the separate bill which I have introduced, which I hope we will be able to get before the Senate this year also, because I think it provides some of the essential background that gives support to your effort here today.

In my role as ranking minority member and former chairman of the Permanent Subcommittee on Investigations, I have had occasion to become especially familiar with the problems of the American waterfront. Over the last year, our staff conducted an extensive investigation of the influence which organized crime exercises in both the International Longshoremen's Association and the American shipping industry. That effort entailed many months of witness interviews and evidence gathering, concentrated in ports on the eastern seaboard, particularly New York and Miami.

Building on the success of the UNIRAC investigation of the Department of Justice and the FBI, our investigation disclosed that the well-being and integrity of the American waterfront economy is seriously threatened by the corrupt influence and power of organized crime.

In light of such alarming evidence of criminal activity, our subcommittee held nearly 2 weeks of public hearings on the subject of waterfront corruption in February of this year. We certainly welcomed and appreciated your presence and participation, Mr. Chairman, as well as that of Senator Hatch, during the course of those hearings.

The Permanent Subcommittee on Investigations' hearings brought to the public eye the fact that our cherished free enterprise system is in serious jeopardy in large segments of the shipping industry. Witnesses from all aspects of the waterfront—management, labor, as well as law enforcement—told us that illegal payoffs and kickbacks have become accepted as a routine cost of doing business in our ports and on our docks. As a result, as you already pointed out, the American consumer suffers by way of both artificially inflated costs of goods and also impairment of labor's efficiency. The rank and file union member suffers by being deprived of not only the jobs he has bargained for, but also the fair and unbiased fiduciary services of his union officers. By contrast, corrupt union leaders and the traditional organized crime families who control them profit considerably by these criminal activities.

As a direct result of those hearings, Senator Warren Rudman and I issued a joint statement of legislative and other recommendations designed to help stem the tide of organized crime's corruption of the waterfront. On May 12, 1981, I introduced S. 1163, designated the "Labor Racketeering Act of 1981." I appreciated your cosponsorship of that bill, Mr. Chairman, as well as that of Senator Rudman and Senator Chiles. S. 1163 offers several specific statutory proposals against illegal kickbacks and payoffs to corrupt union officials. Those payoffs, though illegal under current law, are punishable only as a misdemeanor.

The bill which I introduced makes any such violation involving an amount of money greater than $1,000 a felony, punishable by up to 5 years' imprisonment or a fine of up to $15,000, or both.

The bill also attempts to rid labor organizations and employee benefit plans of the influence of persons convicted of criminal offenses. Current disbarment provisions which are contained in title 29 of the U.S. Code are expanded in several significant ways: enlarging the criminal offenses resulting in disbarment; enlarging the categories of persons affected by the disbarment provisions; increasing the duration of time barred from office or position from 5 to 10 years; and providing for disbarment immediately upon conviction rather than after appeal.

Mr. Chairman, we do provide in S. 1163 that any salary otherwise payable to a convicted union official shall be placed in escrow pending final disposition of any appeal. This is to protect any individual who might later be exonerated on a reversal.

Finally, the bill clearly delineates the responsibility and authority of the Department of Labor to actively and effectively investigate and refer for prosecution criminal activities on the waterfront. We will have much more to say about the Department of Labor and what we consider their nonfeasance in this area and in many other areas in reports that will be forthcoming in the next month or so, hopefully.

Each of those provisions was recommended time and again during the course of our February hearings. Each provision speaks directly to specific instances of criminal conduct documented during both our hearings and the UNIRAC investigation. Founded on clear and proven evidence of those problems, S. 1163 deserves prompt and thorough consideration by the Senate.

In our joint statement of recommendations, Senator Rudman and I also specifically urged congressional action to amend the present provisions of the Federal Longshoremen's and Harbor Workers' Act. Our February hearings included testimony which detailed the fraudulent manipulation of that act by members of organized crime. We heard of the skyrocketing costs of insurance and workmen's compensation claims under the act on the New York/New Jersey waterfront. Those costs were the direct result of a flourishing fraudulent claims racket operated by members of organized crime. We received testimony regarding the criminal prosecution and conviction of Anthony Scotto, former president of Brooklyn ILA Local 1814, and an alleged member of the Gambino organized crime family. We learned that Mr. Scotto had successfully used his control over that racket as leverage in extorting hundreds of thousands of dollars in illegal payoffs from stevedoring interests. Moreover, we were told that at least one company who was not "a friend" of Mr. Scotto's was forced to close down a portion of its waterfront operations due to an astronomical rise in claims costs under the act.

Certainly our hearings and the evidence presented therein amply demonstrated that there are serious problems with the present provisions of the Longshoremen's and Harbor Workers' Act. The threat of corruption continues to hang over large segments of the shipping industry. Congressional action must be taken to attempt to restore some semblance of free enterprise to the waterfront. S. 1182 is a comprehensive and detailed revision of the entire Longshoremen's and Harbor Workers' Act. In cosponsoring the bill with you, Mr. Chairman, I have registered my specific endorsement of several sections which speak directly to the criminal and fraudulent abuse of the act documented during the Permanent Subcommittee on Investigations' inquiry. The need for each of those sections has been amply established by testimony and evidence received during our February hearings.

Section 3 of the bill makes several changes in the current law. Its initial subsection is procedural in nature, merely conforming this section to the definitional scheme set forth in section 2 of the bill. Subsections (b) and (c), however, are designed to eliminate the number of fraudulent claims filed under the act. Subsections (b) tightens the restrictions on payments of benefits where intoxication was a contributing factor in the injury. Particularly important is subsection (c), which bars the payment of benefits to any person who has made a false representation concealing a material medical condition in an employment application.

Section 5 of the bill is lengthy and detailed in scope. It strikes at the very heart of the fraudulent claims racket by revising the procedures for physician selection, reporting requirements for claims, examination and reexaminations of questioned claimants and other medical evaluations designed to insure payment for valid claims only. Current law permits a free choice of physician by the employee. Testimony during our hearings established that that procedure has repeatedly allowed those filing fraudulent claims to select doctors engaged in the racket. The bill provides that physicians be chosen from a list authorized by a Deputy Commissioner of the Department of Labor. That type of procedure should serve to insure the integrity of the treating physician.

Section 11 revises the current hearing procedure in order to facilitate the discovery of fraudulent claims. Especially important is subsection (a), providing the Deputy Commissioner with expanded investigative authority to fully examine the validity of a disputed claim. Our hearings disclosed that the Department of Labor has done little, if anything, to eliminate the fraudulent claims racket. Certainly, this grant of investigative resources should serve to facilitate a more active role by the Labor Department in this area.

Section 12 repeals the current section 20 of the act, which establishes an automatic presumption of validity for any claim filed. Our hearings identified that presumption as one of the main factors contributing to the success of the fraudulent claims racket. Time and again, we heard that the section 20 presumption presented a nearly insurmountable hurdle for an employer who attempts to dispute the validity of an apparently fraudulent claim.

Section 21 raises the criminal penalty for misrepresentation in the submission of a claim from a misdemeanor to a felony, punishable by up to 5 years' imprisonment, a fine of $50,000, or both. Again, this change was specifically and repeatedly recommended and justified during the course of our hearings.

Last, section 28 amends the current antidiscrimination section of the Act to prevent the levy of a penalty against any employer who dismisses an employee for the filing of a claim shown to have been fraudulent. As the act now stands, such an employer is subject to a penalty of up to $1,000 in reimbursement of lost wages of the employee. No distinction is currently made between the dismissal of an employee who has filed a valid claim and one who has filed an obviously fraudulent claim. The infairness to the employer of the present provision is abundantly clear.

In addition to sections dealing directly with the problem of criminal fraud, S. 1181 offers a number of other legislative revisions of the act which our hearings did not specifically deal with. I look forward with interest to the testimony and evidence to be presented during the course of these hearings on the need for these additional legislative changes. Careful review and consideration by Congress should be given to all of the suggested revisions of the act.

In closing, Mr. Chairman, there seems little doubt, given all the evidence, that the economic well being of the American waterfront has suffered considerably from a pattern of criminal corruption. The threat of organized crime continues to endanger the free enterprise system in that segment of our economy. Congress must act swiftly and effectively to take appropriate legislative steps in that area. I encourage and commend the efforts of you, Mr. Chairman, the subcommittee, and the full committee in that direction.

I might just add one more word, Mr. Chairman. I am not under the illusion that we can cure any problem completely and permanently by any law. I gave up on that a long time ago. But I do believe that we can pass laws that will insure an element of fairness and will give the rank and file union members an opportunity to clean their own house if they choose, and will also give the employers a chance to really be honest in their own business if they choose. In the final analysis, whether the waterfronts of America are cleaned up will depend on the rank and file union members and the employers who have the most at stake in that area of our economy.

Senator NICKLES. I think that is a point well made, and I certainly join with you and applaud your efforts, not only on this bill, but also on your bill, S. 1163.

Do you have a second, Senator Nunn, for a couple of questions?

Senator NUNN. Surely.

Senator NICKLES. You mentioned in your statement and in our previous discussions, the act as it is right now and the way the waterfront has been operating, and as the testimony in your Permanent Subcommittee on Investigations pointed out, is running a real fraudulent claims racket. Could you tell us how they operated and how they were able to come up with the claims racket that is prevalent today?

Senator NUNN. Mr. Chairman, I think if you go back to the Longshoremen's and Harbor Workers' Act, it was amended in 1972. Under those amendments, a claimant could use a physician of his own choice. That is the law we are under today. Prior to those 1972 amendments, the act provided that claimants had to use physicians selected from a panel nominated by employers and approved by the Department of Labor. The new free choice which came in with the 1972 amendments facilitated the creation of an organized racket in Brooklyn, in which dishonest longshoremen, physicians, lawyers, and compensation representatives conspired to create false claims in order to collect workmen's compensation payments for themselves. The same physicians would diagnose subjective false injuries, and the claims would be handled by the same attorneys. After the claim was paid, they would be paid off for the fraudulent diagnosis.

The racket was almost impossible to beat, because it is so difficult to challenge a doctor's findings, especially on subjective soft tissue issues—and a great number of the injuries on the waterfront are soft tissue issues.

I do not in any way want to imply that there are not serious injuries on the waterfront that need complete protection. There are. There are many people who are injured very grievously on the waterfront, and I think any act would have to recognize that fact. Certainly, none of us recommend changes that would deprive anyone injured of the compensation that they are entitled to. But the situation right now is just ripe for fraud. And the funny thing about it—it is not funny, it is sad—the fraudulent claims racket works in two ways. First of all, there is an upswing where the fraudulent claims go way up. Then, if the right payoffs are made, they come down. And it is not the workers who are being paid when they come down. It is the corrupt officials who are being paid to prevent workers from receiving, in some cases, what they are entitled to, and in others, what would otherwise be a fraudulent claim. So there is fraud on both the upswing and the downswing in these claims.

Senator NICKLES. During the testimony I alluded to before, which probably shocked me more than anything else, was the fact that the premiums went up so dramatically after a payoff of $5,000 per month in cash under the table, and the claims and premiums came down considerably.

Why do you think insurance costs and workers' compensation claims are so important to the waterfront industry?

Senator NUNN. Well, I do not pretend to be an expert on the waterfront industry and how the economics of it work, but as I understand it, most of the costs on the waterfront between competing companies are very similar—the same labor costs generally apply, the same equipment costs, and so forth. And the second largest cost that most companies have other than labor is their insurance costs and their claims. When you have one company that is paying out, with 200 workers, a couple hundred thousand dollars a year in claims and another company with 200 workers paying out $2 million in claims, then the latter company simply is not competitive. So it is a matter of staying in business.

We found in case after case that employers felt that the only way they could participate in business was to participate in the corruption. That is a sad day in America. We go around the world and we visit countries and we hear about countries where corruption is pervasive. We wonder how the free-enterprise system can operate there, and then we come back home and say thank goodness it is not in our country. Then we run into this situation, which is in a vital segment of our economy, and we see that the waterfront, according to the witnesses we had—and they were numerous, both from labor and from the employers—it just is rife with corruption. We just do not have a free-enterprise system left in many areas of the waterfront. That is not to say that there are not honest, decent, hard-working and honorable people there, but it is to say that in many cases, they do not have a chance; the ones who are honest are at a great competitive disadvantage.

Senator NICKLES. And then, not only in our country but as compared to Canada, also?

Senator NUNN. Well, I think it is obvious that we are seeing some shifts, and we are seeing a deteriorating competitive position for the United States in the waterfront and shipping industry. I do not say it is all due to this because there are probably a lot of other economic reasons, but I think this is certainly a factor.

Senator NICKLES. We found in doing a little homework that compensation rates bounced anywhere from the $80-some in New York, down to a few dollars in the other States or other ports. We found in Canada where the rates are averaging, I think, about $5. So our rates are basically, on an average, about 10 times higher in the United States as compared to Canada. It is obvious that, considering the magnitude of the costs, we are not just talking about little expenses. As you said, the second highest cost to a stevedoring company or a company in that business, the shipper is going to see if he can go a couple hundred or a few hundred miles to save.

Do you have any specific examples of this effect of the claim racket on the waterfront?

Senator NUNN. Mr. Chairman, you alluded to one case, and let me just give you the specifics on that one. I believe it is the same one you are talking about, although we had several. One witness testified before the House subcommittee that their workmen's comp claims rose from $230,000 in 1972—that was before the Longshoremen and Workmen's Compensation Act was amended—it went from $230,000 in 1972 to $616,000 in 1973 to over $1.4 million in 1974. This caused a direct increase in cost of $2 million and an increase in insurance premiums from $400,000 to $2.5 million in 2 years. In 1974, this company's net worth was $2 million. In desperation, the company agreed to pay off an ILA officer, Anthony Scotto, to take care of the problem. From 1975 to 1978, Mr. Scotto, according to the evidence before our subcommittee, was paid $65,000 per year, and the claims fell from a high of $1.4 million in 1974 to $375,000 in 1976. This company was thus saved from bankruptcy at the price of their own integrity.

Senator NICKLES. I was alluding from memory. I appreciate those specific figures for the record. I think it is very important.

Why do you think it is important to have an independent physician involved in the handling of workers' compensation claims?

Senator NUNN. Mr. Chairman, a lot of these claims are subjective and a matter of judgment, and if a worker can simply pick his own doctor, it just leads to the kind of corruption that we have seen. I think we ought to have objective doctors, and I think they ought to be chosen from a panel, and I think the Labor Department ought to play a role in that. I do not believe the employer should dominate the total selection, nor do I believe the employee should. I think it ought to be a balanced situation so that we get objective, honest medical opinions. That is what we need.

Senator NICKLES. During your hearings, was that a lot of the racket that was involved—they had a particular doctor who would automatically grant them a very high amount of disability for whatever it would be? Was the doctor in on the take? Did you go that far?

Senator NUNN. Certainly, the implication was yes. We did not get into great detail on that, but we surmised that that was the case in many instances.

Senator NICKLES. Senator Nunn, I appreciate your comments and your support. I will reiterate my support for your legislation and commitment to hopefully try and do everything we can to do something on that this year, also.

Senator NUNN. I certainly hope, Mr. Chairman, that we can have hearings on that legislation also. I would hope that the two of these bills could move in parallel, because both of them are along the same subject, and I think the evidence is abundantly clear we need to move in both directions.

Senator NICKLES. Very good. I appreciate your help.

Senator NUNN. Mr. Chairman, one other word. The Stevedoring Association has, since these hearings, constructed a committee, as I understand it, to begin working on a code of ethics for their own association. I think that is a strong step in the right direction. It was one of those things that Senator Rudman and I recommended.

I think the employers have a real role to play here. It is one thing to point the finger at corrupt union officials and say it is their fault. That may be or may not be true in some cases, but the employers always have to participate. If they do not, there is no way that payoffs can occur. So employers have just as heavy a responsibility and duty here as union officials. Both have an ethical responsibility and a fiduciary position, as far as I am concerned.

I want to point out that the Stevedoring Association is moving in that direction, and perhaps you would want to hear from them directly.

Senator NICKLES. Thank you very much. I certainly concur with your statement.

In our first panel this morning, we have three gentlemen: William Gardner from Braswell Shipyards in South Carolina; William Taylor, National Steel & Shipbuilding Co., San Diego, Calif.; and Red Osborn, with Atlantic & Gulf Stevedores, Inc., New Orleans Steamship Association, and National Association of Manufacturers.

Also, at this time, I would like to enter the statement of Senator Hatch into the record.

[The following was received for the record:]

OPENING STATEMENT OF SENATOR HATCH

Senator HATCH. It is especially gratifying to see the distinguished chairman of the Labor Subcommittee, Senator Nickles, taking the initiative in yet another area of Federal labor law that cries for reform. Already this year Senator Nickles has chaired hearings to examine the Walsh-Healey Act, the Davis-Bacon Act, the Mine Safety and Health Act, as well as the Fair Labor Standards Act. The hearings on these laws have brought into sharp focus the imbalance which has often pervaded these programs. We have seen how Walsh-Healey's overtime retrictions are outmoded and out of step with the standards that were subsequently laid down in the Fair Labor Standards Act. We have witnessed once again how the Davis-Bacon Act unfairly inflates labor costs, thus in some instances curtailing the funds available for subsidized housing. The Mine Safety and Health Act, with its emphasis on punitive remedies, has engendered a hostile, adversarial relationship between Government and industry. This has surely undermined efforts to promote health and safety in the workplace.

Today we turn to the area of workers' compensation. This, of course, is not the first occasion which the committee has had to examine the Longshoremen's and Harborworkers' Compensation Act. In September of last year the committee held a day of hearings on the act. However, I would point to a marked difference. Whereas last year's hearing was an oversight hearing, today we predicate the committee's action on a comprehensive reform bill—S. 1182. This is significant for several reasons. First, the bill reflects a bipartisan effort to correct the abuses which have arisen under the Longhshore Act. In this regard, I am particularly pleased that Senator Nunn, who has cosponsored this bill with Senator Nickles, is testifying today. Senator Nunn has made a major contribution in laying the foundation for this reform bill through his Investigations Subcommittee hearings in the last Congress. He has helped to document the way in which the Longshore

Act has become a tool for extortion. And I am confident that the reform bill, with the support of Senators from both sides of the aisle, will put this program beyond the grasp of organized crime.

It is also important to note that with these legislative hearings we set the stage for a serious effort to bring this bill to the floor. I intend to give Senator Nickles—and Senator Nunn—my full support to pass this legislation in this Congress. The extensive hearings held by the Senate and House Labor Committees to date have provided a compelling record of the need for reform.

It is simply unacceptable and unjust that the premium for longshore coverage in New York have risen to $87 per $100 of payroll; and that a company which has reduced its annual injuries by 27 percent since 1973 has experienced a 300-percent increase in premiums. It is because of these startling statistics that companies have literally gone out of business, thus aggravating unemployment. And it is because of these statistics that Canada is gaining a competitive advantage in shipping; witness the fact that in some Canadian seaports the premium for longshore compensation coverage is as low as $2.25 per $100 of payroll.

Clearly there is a need for reform, and I hope that S. 1182 becomes the vehicle.

Senator NICKLES. For our panel members, I would like to say welcome and thank you. I see all of you came from some distance, and I appreciate it.

Would you mind identifying yourselves, so I will know who is who?

Mr. GARDNER. I am William Gardner, Senator, from the law firm of Foley, Hoag & Eliot, representing Braswell Shipyards.

On my left is Mr. James Braswell, vice president of Braswell Shipyards.

On his left is Mr. Rick Meitzler, the safety director at Braswell.

Senator NICKLES. Thank you.

Mr. OSBORN. Mr. Chairman, I am Red Osborn, counsel for Atlantic & Gulf Stevedores, in New Orleans. I am with Mr. Daniel Vannoy, from the National Association of Manufacturers.

Mr. TAYLOR. I am William Taylor, Mr. Chairman, and I represent National Steel & Shipbuilding Co.

Senator NICKLES. Are you from San Diego?

Mr. TAYLOR. Yes, sir.

Senator NICKLES. Gentlemen, thank you. I would like to ask all of our witnesses, including myself, if we will concur and hold ourselves to a 10-minute time period. This will allow you to get your statements into the record. All of your statements will be entered into the record in full in their entirety, so it is not really necessary, unless you wish to do so, to read your statement. However, the shorter the statements, the better I like it, because that way, I can ask you more questions. I think many times, this gets to the heart and soul of what we are trying to accomplish.

Mr. Gardner, would you care to proceed?

STATEMENT OF WILLIAM L. GARDNER, ESQ., REPRESENTING BRASWELL SHIPYARDS, INC., S.C., ACCOMPANIED BY JAMES BRASWELL, VICE PRESIDENT, BRASWELL SHIPYARDS, AND RICK MEITZLER, SAFETY DIRECTOR, BRASWELL SHIPYARDS; R. A. (RED) OSBORN, JR., ESQ., REPRESENTING THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE NEW ORLEANS STEAMSHIP ASSOCIATION, ACCOMPANIED BY DANIEL VANNOY, DIRECTOR, PRODUCT LIABILITY AND EMPLOYEE COMPENSATION SYSTEMS FOR NATIONAL ASSOCIATION OF MANUFACTURERS; WILLIAM H. TAYLOR, ESQ., REPRESENTING NATIONAL STEEL AND SHIPBUILDING CO., A PANEL

Mr. **Gardner**. Thank you, Senator.

On behalf of Braswell Shipyards, Inc., I would like to thank you for the invitation to present to the subcommittee our testimony in support of reforming and amending the Longshore Act, and specifically in support of S. 1182, which you and Senator Nunn recently introduced.

We thank you also for accepting our written statement into the record.

We would like, in the time allotted for our oral remarks, to discuss the salient points of our written statement and answer some questions for you, Senator.

Senator **Nickles**. Thank you.

Mr. **Gardner**. The Braswell people would like you to know that the effect of this one Federal statute on its business is far out of proportion with the effects on its business of other statutes. And some of those that affect the contracting business and the shipbuilding industry, as you know from other hearings, are substantial indeed.

The cost of claims and the costs of administration are crushing, particularly to a company the size of Braswell. They have a great concern over the amount of fraud they have seen in the operation of the program. We point out, as you know, that these costs flow directly through to the taxpayer.

I would like first to tell you something about Braswell and then relate our experience with the act. Braswell conducts its operations primarily in South Carolina, although they are presently doing some work in Scotland. Braswell also did some work in Brooklyn in 1974 and 1975. They got some ship repair contracts there, and it was at a time when they were on a growth curve. This company was started only about 10 years ago, with just a handful of employees. Today, Braswell is rapidly approaching a thousand. Most of their work—in fact, 99 percent of their work—is in the ship repair and overhauling business for the U.S. Navy, Coast Guard, and the Military Sealift Command.

Every Braswell worker except a handful of people in the office is covered by this act. Braswell is competing at a time when the number of ship repair yards in this business, as we understand it, are on the decline, and a lot of the business is going to foreign concerns.

Braswell's experience at the Brooklyn shipyard in 1974 and 1975, I think, is instructive with regard to some of the issues that are before you. In that period, their work force hit as high as 300 to 400 people. They found that it was not profitable to do business in

Brooklyn. They found that it was not productive. The Longshore Act was a major factor in their pulling out of Brooklyn, and Braswell will not go back. Soon after they closed up there, they found that 24 employees went to the same doctor, had the same attorney, and within months of the yard's closing filed claims for hearing loss. The carrier settled those claims at an average of $12,000 each. In the course of Braswell's doing work there, their Longshore costs went from 20 percent to 60 percent of direct labor, and this happened in the middle of a contract. As soon as that contract was over, they literally and figuratively packed their bags and left Brooklyn.

They had a similar experience in Boston in December of 1976 until July of 1980. They had a number of contracts there, worked on as many as 20 ships, had an average work force of 300 to 350 people, and occasionally it was as high as 600. Their experience there was equally devastating, and for that reason—among others, but primarily because of the Longshore experience—Braswell pulled out of Boston and is now concentrating its efforts in South Carolina. They received what they describe as "hostile and uncooperative treatment" from the Department of Labor; they found the unions noncooperative and hostile; they found pressure to rehire fired workers who reciprocated with false and exaggerated claims; and they had several union members advise them confidentally that the unwritten brotherhood code prevented them from commenting on the legitimacy of the claims of other employees. One union person confided to them confidentially that there were several fraudulent disability cases, but they would not identify those publicly. Now, these cases were referred to Braswell's carrier, who terminated benefits. But the process of uncovering this and the administrative costs, not only of reviewing these claims, but of paying them and the insurance premiums, was tremendously significant to a company this size.

We have, in the course of our statement here, focused on a 36-month period in trying to come up with some statistics for the subcommittee. And I emphasize that the company has done, in my view, an excellent job of trying to put these figures together, but not being a large, major industrial concern, they do not have the luxury of an IBM computer to receive the kind of printouts that would be the most helpful for these statistics. But focusing on a 36-month period from March of 1977 until March of 1980, we estimate that there were between 2,500 and 3,000 people on the payroll at Braswell. Those people filed close to 1,000 claims. We have settled, or the carrier has—and in many cases, where Braswell feels the carrier should not have settled—over 90 percent of those and at a cost of $1.8 million. Some simple arithmetic gets us to an average cost of $1,800 a claim. When you consider that a lot of these are eye injuries and some relatively minor complaints that require one doctor visit, the actual cost of the claim moves significantly higher.

In Boston, Braswell estimated that they were paying about $22 in Longshore premiums for every $100 of direct labor. Mr. Braswell and I have discussed these figures, and his own estimate is that in excess of 50 percent of that $22 can be attributed to either fraudulent or exaggerated claims. I will touch on that more in a minute.

Another significant figure in our view is that upon a review of all of those cases, we estimate that easily 75 percent of them would not have been covered under S. 1182 or H.R. 25 if that were law. The great majority of these claims were ones that would be traditional workmen's compensation claims, were it not for the act.

We also feel that the employee would have received benefits comparable to his neighbor, particularly in South Carolina and Boston, and that if the act were amended, it would enable a company like Braswell to compete for some nonmaritime work and therefore keep their work force up during periods of inactivity.

A startling aspect of these statistics that I related is that they pertain to a company with an excellent safety record. The company is very proud of their safety record, and particularly of the improvements they have made recently in the area of prescreening and counseling on injuries and so forth.

Our review of Braswell's safety records resulted in our comparing them to industry records compiled by the Bureau of Labor Statistics. I assume you are familiar with the BLS statistics and the severe incident categories they describe. In the ship repair industry, the severe incident rate per 100 employees on the payroll was approximately 21 percent in 1978 and 24 percent in 1979. Braswell's severe incident rate for those 2 years, with respect to its operations in South Carolina, was 12 percent and 5.34 percent, respectively—which we think are good figures. In Boston, their rate for the 2 years was 100 percent and 46 percent. The 100-percent figure means in effect that Braswell was paying for an hour on the job for every hour of labor they got. The percentage of Braswell workers in each jurisdiction who filed claims, the figures there are somewhat telling, because several times, more claims per population took place in Boston than in South Carolina.

Senator **Nickles**. Could I interrupt and ask you some questions, if you don't mind?

Mr. **Gardner**. Yes, please.

Senator **Nickles**. Your firm actually left New York and Boston because you were faced with a situation where your workers' compensation payments were anywhere from—I heard figures originally of 20, and then they jumped up to 60 percent, 80 percent, and 100 percent in Boston? One hundred percent of your employees actually filed claims, too, in Boston; is that correct—just looking at your statement on page 7. Did all or most all of your employees end up filing claims in Boston?

Mr. **Gardner**. Not every single one, but a sizeable majority of them did, Senator. What makes the figures high is that some people filed more than one claim.

Senator **Nickles**. Did the number of these claims that were fraudulent and so on just basically run you out of those two cities?

Mr. **Braswell**. It was the primary reason for us leaving Brooklyn. In Boston, it weighed heavily in our decision to leave Boston. But Brooklyn was apparently the most abused. And especially after shutting Brooklyn down and seeing the reaction of the claims that came in after shutting Brooklyn down, we notice now that there is the same pattern in closing the Boston yard, also.

Senator **Nickles**. Once you shut down, do you notice a flood of claims?

Mr. **Braswell**. That is correct, or whenever you hit a slack period of work. In Boston, our workload dropped off dramatically the last year we were there. They saw the handwriting on the wall that we were in a process of determining whether or not to keep the yard open, and at that point in time, they started flooding us with the claims about a year before we closed the yard.

Senator **Nickles**. In that case, do you think maybe some of the groups or unions, or whatever, were trying to use this as unemployment compensation in addition to workers' compensation?

Mr. **Braswell**. That is correct, and also life insurance. We have had people up there who have left the yard after working hours, have died after leaving the yard, and that is one of the cases that we have identified here, and now they have attributed it to Workmen's Compensation as a work-related injury, and we have evidence now to prove that it is not work-related, yet we are being denied access to present this to the Department of Labor.

Senator **Nickles**. Under present law, you are required to pay? It is a non-work-related death—in other words, he was killed in an automobile accident in XYZ County or whatever, but it did not have anything to do with your business—but you are actually required to pay this amount? Is it $456 a month as a maximum for his survivors' lifetime, with cost-of-living adjustments made as it goes up?

Mr. **Gardner**. This is not a case where a person who was not on disability died and his widow received the benefits, which is another problem that I understand you are concerned with. This is a case where a worker left the Braswell facility, went to a bar, and then had a heart attack and a spleen injury there, and sometime later—I cannot remember the exact time—filed a claim saying that he had fallen down earlier on the job, and that that was a factor, if not conclusive, as far as his injury was concerned.

Now, we all suspected this. Our firm and Braswell conducted an investigation, and we have determined that that was false, that there was no nexus between any such fall on the job and what happened to him later in the bar. The carrier handled this case at a hearing before the ALJ, Department of Labor, and the record was left open for a number of reasons. And we came up with this evidence and went to the Department of Labor ALJ and said, "We want to present this. We have substantial evidence that it is a fraudulent claim." We were denied the right to participate in that hearing. We have that on appeal right now, but this has happened before, where an employer who was sufficiently interested in the amount of money that his carrier is paying to the claimant—and it is a pass-through—that he wants to participate, he wants to spend his own money and his own counsel or his own investigators, and say, "Hold it. This claim is fraudulent. We should not be paying this."

Senator **Nickles**. Did your carrier give you an actuarial equivalent of the present value of those benefits or future benefits?

Mr. **Gardner**. $350,000 is what is being negotiated.

Senator **Nickles**. You are negotiating over $350,000, a lump sum payout, so you do not have to pay for this thing forever and forever, depending on the age of the spouse.

Mr. **Gardner**. Our concern is in not being allowed to participate and present testimony. The company is quick to support a legitimate claim, but very feisty about an illegitimate claim. And the present act does not really specify whether an employer has the right to participate in the hearing, in addition to his carrier's participation. And perhaps, by amending section 919(c) and defining an interested party, this could be cured.

[The prepared statement of Mr. Gardner follows:]

FOLEY, HOAG & ELIOT
1920 N STREET N. W.
WASHINGTON, D. C. 20036
TELEPHONE: (202) 785-8800

IN BOSTON
10 POST OFFICE SQUARE
BOSTON, MASSACHUSETTS 02109
TELEPHONE: (617) 482-1390

STATEMENT OF WILLIAM L. GARDNER
FOLEY, HOAG & ELIOT
ON BEHALF OF BRASWELL SHIPYARDS, INC.

My Name is William L. Gardner and I am an attorney with the Boston and Washington law firm of Foley, Hoag & Eliot. We represent Braswell Shipyards, Inc., whose headquarters are near Charleston, South Carolina. With me today are Mr. James Braswell, Vice President in charge of Operations, and Mr. Rick Meitzler, their Safety Director. On behalf of Braswell I would like to thank you, Senator Nickles, for the invitation to present to the Subcommittee our testimony generally in support of reforming and amending the Longshoremen and Harbor Workers' Compensation Act, and specifically in support of S.1182 which you and Senator Nunn recently introduced.

We expect you will find that Braswell is a microcosm of one of the many industries suffering from the very pervasive illness I call Longshore abuse. The extent to which Longshore claims and administrative costs affect this Company's business is staggering. When one considers that

Braswell's costs are passed on to the Navy and ultimately to the taxpayer, the exponential effect of Longshore costs on an industry-wide basis become almost beyond calculation. We hope that we can make a contribution to the Senate's efforts to amend this statute and reduce the ultimate costs to the consuming public of repairing American Naval vessels.

I would like at the outset to tell you something about Braswell Shipyards, Inc., and give you a brief account of their experience with the Longshore Act. Following that, I would like to address several major problems with the present act and point out, in more detail, how Braswell's experience suggests the need for reform.

Braswell Shipyards, Inc.

Braswell is a privately-owned small business which was started fewer than ten years ago with six employees. At the present time Braswell employs between 600 and 700 persons in South Carolina, and 100 in Scotland; up to 100 have worked periodically in Kings Bay, Georgia. Ninety-nine percent of Braswell's business is in ship repair and overhauling for the United States Navy, including the Military Sealift Command, and the United States Coast Guard. Every Braswell worker except a handful of people in the office is covered by the Act. Braswell competes in a very labor intensive industry, and does so at a time when the number of ship repair yards in the country is on the decline.

Most of Braswell's work, with two major exceptions, has been conducted out of its South Carolina facility; some has been performed overseas in Scotland. These two exceptions were projects at the Brooklyn Naval Shipyard and at the Boston Naval Shipyard. The first project was in 1974 and 1975 when Braswell leased a portion of the Brooklyn Naval Shipyard to fulfill several ship repair contracts. At its peak period, Braswell employed between 300 and 400 people in Brooklyn and did repair and overhaul work on approximately six vessels. Less than two years after starting work there, Braswell closed up its entire operation because it was impossible to maintain a satisfactory profit level or an adequate level of productivity. The overwhelming number of Longshore claims, with the resulting substantial settlement costs and skyrocketing insurance premiums, were a major factor in Braswell's decision to leave Brooklyn. For this reason alone, Braswell Shipyards will not seek further ship repair contracts at that facility. We regret we are unable to provide details with respect to the nature and number of claims arising out of the Brooklyn contracts because just prior to Braswell's closing its operations there all Company records, including medical and personnel records, were stolen.

The second Braswell project, and one which is decidedly relevant to this Subcommittee, was its experience in the

Boston Naval Shipyard. Braswell started there on a lease basis in December of 1976. They ceased operations in July of 1980. In that four year period, Braswell repaired more than 20 ships, including destroyers, geodectic survey ships, fuel ships, and cargo ships. The work force there averaged between 300 and 350, and at times was as high as 600.

To help the Subcommittee understand Braswell's experience under this Act, we have focused on a 36 month period from March 1977 to March 1980 and analyzed our Longshore data for that period. As near as we are able to estimate, Braswell had on its payroll in this 36 month period approximately 2500 to 3000 different individuals, who filed a total of approximately 1000 claims under the Longshore Act.

The most telling statistic, in our view, is the fact that of the approximately 1,000 alleged injuries that occurred in this 36 month period, fully 75% of them according to our analysis would not have been covered under S.1182 but would have been covered under State Workmen's Compensation statutes. Moreover, these 1,000 claims represent, in actual dollars paid out by Braswell's insurance carrier, in the neighborhood of 1.8 million. What is particularly crippling to a Company of Braswell's size is the fact that while the paid out claims in this period ran in the vicinity of 1.8 million, the premiums paid were in the vicinity of $3 million. This resulted in a substantial reserve for the unpaid or unsettled cases that number fewer than 100. While some of this reserve may eventually be returned to Braswell, the problem is that a company this size ties up a tremendous amount of its capital in insurance premiums because of the way the insurance system works under the Act. We will return to these cost problems later in our statement.

Longshore Act Problems

Our analysis of these approximately 1,000 claims indicated that the alleged injuries were broken down generally into several categories, including 400 or so back injuries, 250 or so contusions, 225 eye injuries, 5 deaths and the remainder were miscellaneous. The great majority of these injuries were off ship and would not have been, as I indicated above, covered under either S.1182 or H.R. 25, the Bill presently pending in the House. While we recognize that Braswell would still be required, with respect to 75% of these claims, to make some payments under state unemployment compensation programs, there is no question, given the rate structures, that under the state programs Braswell's, the government's and the taxpayers' costs would have been reduced substantially.

Let me provide some examples of the higher costs under the Longshore Act. A back injury that under the federal act would result in a settlement of $150,000 would in South Carolina, where ratings are strictly according to American Medical Association standards, justify a maximum award of $100,000. The loss of any portion of the smallest finger would generally result in an award or settlement of $4,000 under the federal act, but only $1,200 under South Carolina workman's compensation laws. Similarly, recovery for the loss of an eye that under the federal act averages $75,000 would under South Carolina law be limited to $35,000. Massachusetts workman's compensation figures, which are among the highest in the country, are closer to, but usually do not reach, federal levels.

If the coverage provisions of S.1182 had been the law, and had Braswell accordingly been able to reduce its claims during the described period by 75%, local jurisdictions would have had more involvement in the workman's compensation cases and Braswell would have been competitive with other employers in its geographic community. This would not, in our view, result in an inequity to the worker because he would be receiving the same benefits as his neighbor who may have been similarly injured and protected by the state statute.

The present coverage provisions in the Act harm us in another way. Much of the work performed by Braswell employees on a given day is no different from the work taking place in industrial and manufacturing operations throughout the country. But because Braswell employees are covered by the prohibitively expensive Longshore Act, the Company cannot compete on non-maritime work which could help sustain it during the workload lulls that are so common to the ship repair industry. By incorporating the "water's edge" provision in any amendments, you enable Braswell to become more competitive in seeking additional work it would be so capable of undertaking were it not for the Longshore Act.

An uniniated observer might suggest that such a high number of Longshore claims reflects a poor safety record on the part of the employer. This is certainly not the case with respect to Braswell and an examination of applicable safety statistics bears this out. We have reviewed Braswell's safety records and compared them to those industry records compiled by the Bureau of Labor Statistics ("BLS"). BLS defines a "severe incident" as any incident that requires medical treatment and involves lost time from work. In the ship repair industry, the severe incident rate per 100 employees on the payroll was approximately 21% in 1978 and 24% in 1979. Braswell's severe incident rate for those two years, with respect to its operations in South Carolina, was 12% and 5.34% respectively. In Boston, Braswell's rate for those two years was 100% and 46%. Inasmuch as these

BLS statistics are designed to measure both frequency and severity of exposure, the 100% figure suggests that during that particular year Braswell paid for an hour off the job for every hour of labor they got. The clear conclusion to be drawn here is that the Boston labor force is generally more claim oriented. This conclusion is supported as well by other data Braswell has collected.

Another problem addressed by the proposed legislation is the high cost of death benefits, and particularly those paid on account of deaths that were unrelated to employment, or, if arguably related to employment, would not have been covered under S.1182. In the last five years Braswell has had a total of five deaths reported with only two arguably being employment related. The others were not directly related to employment, and none of the five would have been covered under S.1182. All but one have been settled on a lump sum basis.

The facts of these incidents are enlightening. One worker fell from a lifeboat on board a vessel in drydock. Another was overcome by carbon monoxide fumes when searching for a leak in a receiving room. These two were the ones that while having, in a generic sense, a reasonable nexus to employment, would not have been covered by S.1182. Nor, in our view, would federal coverage have been necessary to fulfill one of the historical objectives of the Longshore Act -- that is, to provide coverage for those working over water.

A third worker suffered a heart attack while at work but on land. He too would have been adequately covered under the South Carolina law. (The worker's nephew, who worked for Braswell's then-insurance carrier, was instrumental in settling the case, but did so without the requisite Department of Labor approval. Needless to say, that matter is in litigation.)

The last two cases would be comic, were it not for the tragic consequence of death. The first involved a man who was working on what is known as a "dolphin" in construction terminology. This meant he was on a pier-type structure surrounded by water. When the company boat on a warm day motored around to return each worker to land at the completion of work, this particular employee refused the transportation and insisted on "taking a swim." He drowned before he could reach land. While S.1182's "situs" test might have been met, it is doubtful whether the "status" definition would have applied.

Finally, we come to the case of a 60 year old man who suffered a heart attack and ruptured spleen in a bar while drinking after working in Braswell's yard, where he had been employed for a year and a half. His estate has made a claim for $350,000, alleging that he had earlier suffered a fall while at work. Although this matter was handled at hearing by Braswell's then-insurance carrier, both present counsel and Braswell suspected the accuracy and bona fides of the claim. Substantial independent investigation was conducted, with the result that we developed evidence disproving contentions going to the heart of the claim. We brought this evidence to the attention of the Administrative Law Judge who ruled, incredibly, that the employer could not participate, despite his possessing evidence rebutting the claim. This illogical and unjustifiable consequence, which we are appealing to the Benefits Review Board, illustrates the deplorable situation Senator Nickles described in the Senate when introducing S.1182 - the Department of Labor acts as judge, jury and prosecutor in the handling of Longshore claims. We therefore ask that you give serious consideration to adding to the bill language which would clearly spell out the right of an employer to participate, at his own expense, in any case wherein he feels his carrier is inadequately protecting his interests.

There are even more inequities to the present statutory scheme which allows recovery of benefits for deaths occurring while the employee was not "directly engaged in activities relating to ... employment" and was not "upon the navigable waters of the United States or floating drydock thereon ..." as S.1182 provides. One major inequity is the fact that such deaths, even if the settlements pertaining to them are not high, drastically raise the cost of insurance premiums, forcing a contribution to the reserve which ties up working capital beyond a level any reasonable financial analyst would think necessary for the payment of future claims. While the insurance industry may say, with partial justification, that the wildly unpredictable claims environment under the Longshore Act necessitates the setting of substantial reserves, the basic, unalterable conclusion is that Braswell, the Navy, and the public suffer the financial consequences.

The next area of substantial concern to Braswell is the problem of pyramiding of benefits. There is ample proof that this pyramiding takes place and it involves several different forms. There are instances where workers who are receiving Longshore benefits are also applying for and receiving state unemployment compensation benefits; private health insurance benefits; social security disability payments; and private policy disability benefits. We analyzed our approximately 1,000 cases and discovered that at least 100 of these cases involve workers who were simultaneously drawing unemployment compensation benefits at the state level. Moreover, in half of these 100 cases, the worker had illegally applied for health insurance benefits under Blue Cross/Blue Shield. While we have referred these matters to the Blue Cross people, we cannot cure the mindset that perceives the Longshore benefit program as something to exploit. One cure, certainly, is to amend the Act so as to permit an off-setting of Social Security benefits or other forms of retirement income.

Another reason for amending the Act, in our view, is to return to the Longshoremen's compensation scheme an incentive to return to work. There are a number of provisions in the present Act which, if changed, would alleviate the economic burden on an employer like Braswell. For example, §10(f) should be changed so as not to be known as the part of the Act that makes the cash register ring. The mandating of an annual compensation adjustment equal to an increase in the national average weekly wage requires employers and carriers to enter the field of economic forecasting, and will increasingly result in tax free benefits that will be more windfall than compensation. Other witnesses have addressed, and no doubt will address again, the statistical impact of §10(f) on categories of employee, but suffice it to say that the economic consequences of this provision are greatly magnified for a company Braswell's size.

Another such provision relates to the current 66 2/3 percent compensation schedule, which effectively results in many situations in a person receiving, because the benefits are tax free, more net take-home pay than if he were working. And if the person is pyramiding his benefits, whether legitimately or illegitimately, there is even a further disincentive to return to work. This is particularly true with respect to the longer term disability cases. Braswell recently conducted a special investigation of its longer term compensation cases and determined that four out of ten claimants were working elsewhere while continuing to receive benefits ordered by the Department of Labor.

Braswell sees many other examples of high costs of the Longshore program which could be eliminated without doing an injustice to the affected employee. For example, the pre-injury average weekly wage includes all non-Longshore employment, and benefits are awarded even if the employer was unaware of the second job when the worker was hired. We recently analyzed our data and found that approximately ten percent of the claims against Braswell involved, that we could determine, workers who had other employment, and we strongly suspect that the ten percent factor is low by a wide margin. We estimate that as a result close to a half million dollars was added to our costs during the period studied. Another example is the continuing of full benefits during a period when the employee would otherwise have been laid off, and even into retirement. The Act has accordingly evolved into more of a retirement program than a compensation program.

In closing, we would like to emphasize that these Longshore costs add substantially to our cost of doing business. Because that business is contracting with the government, these costs are written into all our estimates on ship repairs and are to the extent permitted by law thereby passed through to the government and ultimately the taxpayer. One of the most crucially important thoughts we can leave with the Subcommittee is that the large shipbuilding company can more easily absorb these Longshore costs, although they too include them in contract estimating. But the smaller companies, like Braswell, can ill afford the crippling financial consequences inherent in present Longshore Act claims. Braswell Shipyards, Inc. has as a direct and proximate result of Longshore costs already had one financial crisis in its brief existence, which fortunately it has now weathered successfully. But if the Braswells of the industry do not succeed, unlike the situation with respect to some of the larger yards, our country simply loses the business.

A significant element of the dire financial consequences suffered by many employers is the nature of insurance coverage. Braswell is too small to meet the onerous self-insurance provisions of the Act, so it must obtain insurance through a company approved by the Office of Workman's Compensation Programs at the Labor Department. It will be increasingly difficult to survive without insurance available at affordable costs. This will never occur under the present Act because there is no rational way to predict liability.

Braswell's insurance premiums, based on the high number of claims we have outlined before the Subcommittee, have run into the millions of dollars. We emphasize, as you are aware, that the "insurance" is really not insurance at all, because under the present system the employer is paying 100 cents on the dollar for every claim and the insurance company effectively acts as an administrator who takes a percentage for his services and sets aside, with the employer's capital, a substantial reserve to cover projected and speculated losses. We recently calculated that our Longshore costs at our South Carolina facility were $6.00 per $100.00 of direct labor. Our Boston costs, however, were $22.00 per $100.00. We can only suspect, but cannot prove, the extent to which the substantial benefits available under this Act result in fraudulent claims. Clearly, however, the stratospheric number of claims reflects the prevailing view that the present Longshore Act program is nothing more than an unattended candy store.

We could go on for some time and in far greater detail, but you should have by now a picture of what the present statute does to a company the size of Braswell. We applaud your efforts to amend this important statute, and join you in the effort to keep the cobwebs from the docks of American shipyards.

Senator **Nickles**. We are going to have to move on to our other witnesses. For our colleagues who are interested in this legislation, and also all those participating on the panels, we would very much appreciate your specific comments on the legislation as proposed by myself and Senator Nunn. Any improvements which you think we may implement to make the law more effective or more workable for the working men and women will benefit those persons whom we wish to help. I certainly solicit your suggestions and eagerly await your advice and counsel on these matters, because this is really what we are doing. We have 3 days of hearing from people from every aspect who deal with this type of legislation, and we are very, very sincere when we say we do solicit your input.

The changes that were made in 1972 were dramatic. Those changes were made during the last day of session in 1972. They were crammed through—I am going to say, knowing the system and how it works right now—with very little oversight in Congress, very little review. The decisions that we are making today, I think, are going to be very important. They will be given our review and serious study. If you have any suggestions, or you see something in this bill that you think should be amended, corrected, changed, or left alone in the previous statutes, please advise us so. We will certainly keep your thoughts in mind.

Mr. Taylor?

Mr. **Taylor**. Thank you, Mr. Chairman.

First of all, I thank you for the opportunity to appear here and participate in these deliberations and these very important amendments to this act.

By way of background, I represent a number of small shipyards, as well as the National Steel & Shipbuilding Co., which is classified as a large shipyard, and additionally represent Navy and Marine Corps employers whose employees are covered under this act by the provisions of the Nonappropriated Funds Act and additionally, occasional employers who are covered under the Continental Shelf Act and the Defense-based Act. And as such, I have probably handled well over a couple thousand of these claims and tried over 200 of them and appealed many.

The experience of the last 8½ years with the 1972 amendments indicates that the act has been misused, abused, and misconstrued, and it is time for serious reevaluation of the effects of those amendments. And I respectfully submit that Senate bill 1182 would go a long way to correcting the abuses which do exist.

This morning, I would concentrate on what I believe to be the heart of the problem, and that is the process by which an employee proves wage loss which then serves as the basis for an award of disability, at least insofar as unscheduled injuries, which I believe to be the heart of the problem.

By way of preface, I would first of all say that most employees in shipyards and in the longshoring trade are honest, hardworking people. But like in any profession, there are a few "bad apples" who, if not screened out, make the whole barrel go bad. The greed of the few is the problem, and restraining the greed of the few is the object of the amendments.

I would paint the homely comparison of the jewelry store operator who displays his wares on the open table. If left there long enough, a few greedy people are going to take away the merchandise. And for the benefit of staying in business and having merchandise to display to the honest customer, the merchant has to put the jewelry under the counter, so to speak, under glass.

That is the same problem we face with the Longshore Act. As it is now, it is a license to steal, and there is no fee for the license. The lure of big money benefits under the wage loss concept of the Workers' Compensation Act encourages four areas of abuse.

No. 1, it prompts the claimant to avoid work.

No. 2, it prompts the claimant who desires to maximize his loss of wage-earning capacity to avoid rehabilitation.

No. 3, the myth that loss of wage-earning capacity continues way beyond retirement and indeed, transcends the grave, is turning this act into a retirement plan. There are increasing numbers of cases that are being filed by elderly workers, the filing of which coincides with their retirement.

No. 4, the lack of constraints in the act on the unbridled filing of claims encourages the use of the claims process as a method of harassment of the employer.

Permit me to give a few examples. On the issue of avoidance of work and avoidance of rehab, the case I am handling currently involves a young man in his early thirties who was a two-time loser on drug charges. He is an acknowledged alcoholic who had the misfortune of suffering an industrial back injury on the job. Following a period of recuperation, he was returned to work by his treating doctor with a medical restriction precluding heavy lifting. The employer, over the course of a year, made efforts to provide work to this man within these restrictions, which began with lighter jobs in the yard. Finally, he was put in the clerk-type jobs. He finally ended up picking up aluminum cans found around the yard. The reason for the change of light-work job, so to speak, was that everyplace this man went, he complained he could not do it; it was too hard, too heavy. He would generally never come to work on Mondays, and at least 2 of the 4 remaining days, he would show up late. He read on the job, did everything he could to harass and annoy his supervisors. Finally, one day, he went to sleep in broad daylight, and it was witnessed by many, and he was subsequently terminated. The employer, nevertheless, recognizing that this man had a light work restriction, and their potential obligation for temporary total disability and indeed, a permanent and total disability finding, immediately sent him to a rehabilitation specialist. The rehabilitation specialist did a survey of his job skills and experience, and found six jobs available in the existing labor market. An appointment was made, at which time this man was told to get dressed and be presently, and they made efforts to actually take him to the job sites. He flatly refused, stating that he could find that kind of work if he desired it, on his own. Then, the issue of his retraining for other jobs was explored, and he flatly refused any suggestions of any other type of retraining, other than 4 years of college and 3 years of law school. This man, by the way, has a 10th grade education and perhaps an IQ of 95.

The use of a system as a retirement system, perhaps, is exemplified by a few quick examples.

A couple years ago, I had a case involving a 64½-year-old claimant who, on August 15, 1975, told his employer that he was retiring on his 65th birthday, December 15, 1975, and please process his retirement papers. Indeed, on December 15, 1975, he retired. On December 17, 1975, he filed a workers' compensation claim, alleging that since December 15, 1975, he had been totally disabled, due to a pulmonary condition. At subsequent trial of the issue, the employer's doctor demonstrated medically that the man had no pulmonary disfunction, let alone any pulmonary disfunction attributable to industrial causation. The claimant's doctor, on the other hand, a professional in these matters, attributed total disability due to high blood pressure due to exposure to noise, a completely unique theory, and total disability attributable to loss of pulmonary function. During cross-examination of this physician, I managed to pull from his file the documentation on which he allegedly based his opinion of disease and total disability and indeed, it turned out in every case that the X-ray reports, the laboratory reports on which he relied were completely negative, indicating this man had no disfunction whatsoever. Nevertheless, the administrative law judge awarded permanent total disability attributable to the injury. The judge, however, gave the employer the benefit of section 8(f) relief, and by the time the decision was issued, 104 weeks of benefits had accumulated, so the employer paid the 104 weeks and did not appeal. The Benefits Review Board determining the special fund to this day is paying this man a very handsome retirement, and will continue to do so, and if he dies, it will be paying his wife death benefits predicated upon the fiction of death due to nonrelated causes.

Senator NICKLES. Let me be sure that we understand that, and then I will have to ask a couple of other questions.

You went through all that appeal process, and the company ended up having to write a check for $40,000? Is that 104 weeks maximum?

Mr. TAYLOR. I think the maximum for that man would have been about $25,000.

Senator NICKLES. Then he receives a monthly benefit not from the employer carrier but from the special fund under section 8(f)?

Mr. TAYLOR. Yes, and to which all employers contribute.

Senator NICKLES. True. And then, who is liable for the death benefit? Does that come from the special fund, or does that come from the carrier?

Mr. TAYLOR. When he dies, it will be from the special fund.

Senator NICKLES. Let me ask you just a couple of other questions. One, I think in our bill, we tidy up some of the retirement provisions that you are talking about. Do you agree with that? Have you looked at our bill that closely?

Mr. TAYLOR. Absolutely.

Senator NICKLES. Do you think we are doing what we are trying to do?

Mr. TAYLOR. Yes.

Senator NICKLES. Let me ask you another question. You mentioned the current law and talked about the lack of State rehabilitation.

Are employees given an incentive to rehabilitate themselves today, any incentive whatsoever, or is there a disincentive?

Mr. TAYLOR. I feel none. This statement is predicated upon my own experience that in 8½ years of handling these cases exclusively, which probably involved thousands of cases, I have seen two claimants having wage loss claims actually go to a school and then go to work in the open labor market. This experience, I think, is substantiated by a statement made by Deputy Commissioner Cullin, who is the Deputy Commissioner for the 13th Compensation District in San Francisco and who also has supervision, indirectly, of rehabilitation for the 18th Compensation District, which involves Los Angeles and San Diego. He announced at a Longshore seminar about 3 weeks ago that in the 11,000 open lost-time claims in those two compensation districts last year, there were 10 to 20 rehabilitation cases affected by their department, which is a statistic that is less than two-tenths of 1 percent of the total.

Senator NICKLES. Are you pretty familiar with other State workers' compensation programs?

Mr. TAYLOR. I am familiar with the State of California.

Senator NICKLES. Does California have some type of a mandatory rehabilitation program?

Mr. TAYLOR. Yes, they do.

Senator NICKLES. Do most States?

Mr. TAYLOR. I do not know.

Senator NICKLES. I think in the States I am familiar with that they do have some type of requirement or must seek other work or other opportunities, or must be willing to accept training—some type of a mandatory workers' rehabilitation program.

Do you think that we should have that type of mandatory rehabilitative concept in this legislation?

Mr. TAYLOR. Yes, and I would explain. First of all, the problem now is that the motivation of the employee is to avoid rehabilitation because rehabilitation will diminish his permanent disability award in his eyes and in the eyes of his attorney and in the eyes of the administrative law judges and perhaps the Benefits Review Board.

The problem is to take out of the act that motivation.

Senator NICKLES. Do you think the act at present is actually a motivation or a reward not to be rehabilitated and reduce your permanent total, if it should come, or your future benefits?

Mr. TAYLOR. That is correct.

[The prepared statement of Mr. Taylor, with enclosures, follows:]

TAYLOR, JONES & WILSON
ATTORNEYS AT LAW

WILLIAM H. TAYLOR
MICHAEL E. JONES
JOSEPH J. WILSON
RUSSELL E. LAMBEAU
ROBERT H. POTTER

2725 CONGRESS ST., SUITE 2E
SAN DIEGO, CALIFORNIA 92110
(714) 299-8600

June 12, 1981

The Honorable Don Nickles, Chairman
Subcommittee on Labor
Committee on Labor and Human Resources
United States Senate
Washington, D. C. 20510

Re: Proposed 1981 Amendments of the Longshoremen's and Harbor Workers' Compensation Act

Dear Senator Nickles:

Thank you for this opportunity to appear before your Subcommittee on Labor and testify concerning the proposed amendments to the Longshoremen's and Harbor Workers' Compensation Act.

By way of background, our office represents employers in workers' compensation claims subject to the Labor Code of the State of California and Longshoremen's and Harbor Workers' Compensation Act. In the latter regard, these employers include the Navy and Marine Corps employees covered under the Longshoremen's and Harbor Workers' Compensation Act pursuant to the provisions of the Nonappropriated Funds Instrumentalities Act; and multiple shipbuilders and repairers, including National Steel & Shipbuilding Company on behalf of which we appear.

Our clients' work forces give rise to approximately 40% of the claims filed in the 13th and 18th Compensation Districts of the Office of Workers' Compensation Programs, U. S. Department of Labor.

My associates and I have participated in literally thousands of administrative conferences, hundreds of trials before administrative law judges, and have represented our clients on scores of appeals to the Benefits Review Board and over a dozen appeals to the United States Court of Appeals for the Ninth Circuit.

The viewpoint expressed herein arises out of such experience.

We view the Longshoremen's and Harbor Workers' Compensation Act as exhibiting the intention of Congress to formulate an exemplary workers' compensation system fostering the principle of self-administration, fairness to the parties, encouragement of continued productive employment of the injured worker, and the maximizing of benefits for those not able to work.

Eight and one-half years of experience with the 1972 amendments indicates that congressional intent has been misused, abused and misconstrued. Reevaluation of the system indeed is in order. Our analysis of the proposed amendments indicates that this subcommittee has an excellent appreciation of the problems which have arisen and has proposed most appropriate remedial legislation.

By my appearance and this letter, I endeavor to describe problem areas existent in the determination of permanent partial and permanent total disability, rehabilitation and evaluation of hearing loss and sight loss.

1. Problem or problems existent in the resolution of the issue of permanent partial or permanent total disability for "unscheduled" disabilities within the meaning of Section 8(c)(23) predicated upon "loss of earning capacity:"

Significant numbers of claimants claiming loss of wage-earning capacity, in apparent attempts to escalate the value of their claims, actively avoid post-injury work and if working, do so at levels of performance substantially below their capabilities. Often times, those who are working for employers other than that with which the injury occurred take their pay in cash in order to avoid creating a record of post-injury earnings.

From time to time, we are able to establish that such action is predicated upon the advice of counsel or others (see Exhibit "A" excerpt from deposition of a treating physician) but most often, it is inferred from the consistent action of clients of certain attorneys or members of certain unions.

The majority of such claims involve injuries to the back. Many involve what are commonly referred to as "soft tissue" injuries diagnosed as sprains or strains, diagnoses which, two or three years after the traumatic precipitating event, approach the ephemeral. The proposed amendment, Section 8(c)(21) lists injury to the "spine" as a scheduled injury in the absence of evidence of herniated or ruptured disc.

Theoretically, such provision should reduce the number of wage loss claims arising out of soft tissue back injuries. However, the professional claimant's doctor most often, when evaluating a back strain or sprain, includes at least an indication that there is evidence of "herniated or ruptured" disc.

Therefore, it is suggested that such language might be modified to read, "...in the absence of substantial medical evidence of herniated or ruptured disc..." or that the proviso be altogether eliminated.

Of more importance, however, is the need for standardized mandatory guidelines for the medical determination of percentage loss pertaining to the percentage loss of the scheduled injury. For example, assuming 312 weeks of compensation (which at today's compensation rates, would equal from $60,000 to $75,000), how is it to be determined whether the injured employee has a 5%, 20%, 50% or total impairment to the "spine"?

The Department of Labor gives unpublished lip service to the proposition that the "Guides to the Evaluation of Permanent Impairment" as published by the American Medical Association is to be utilized. In practice, when attempting to resolve cases on an administrative or administrative law judge basis, it turns out that this standard is applied only when the examiner or judge feels that the aforesaid Guidelines are adequate and if not, any physician's unique judgment is utilized. This creates a nonuniform "system" which is limited only by the number of imaginative physicians who undertake to evaluate the claimant or claimants similary impaired. A national system requires similar results from similar facts regardless of circumstances of locality or proclivity of administrator of physician.

With respect to the balance of the unscheduled injuries termed "other cases," by Section 8(c)(23), the problems which arise out of the deliberate limitation of post-injury employment or earnings is substantially ameliorated by the proposed amendment to Section 8(h) (redesignated as 8[g]) which provides in part, "...If an employee voluntarily limits his income or fails to accept employment commensurate with his abilities, the wage earning capacity of the employee shall be considered to be the amount which would have been earned if the employee did not limit his income or if the employee accepted appropriate employment."

Query is made, however, as to why these standards are restricted to cases of "partial" disability. Section 8(g) commences with the sentence, "The wage earning capacity of an injured employee in cases of partial disability under subsection (2) or subsection (c) of this section shall be..." At the outset of trial, the judge cannot appropriately presume that the disability being claimed is either "partial" or "total," that usually being the issue. Assuming that the trier of fact indeed ultimately determines that the disability is "total" rather than "partial" to some degree, the trier of fact can argue retrospectively that the provisions of Section 8(g) do not apply to the case where there is "total disability."

Be that as it may, what is the theory in applying a stringent standard of proof to "partial disability" and, by default, no standard of proof to "total disability." The elimination of the word "partial" would not create a conflict with the definition of permanent total disability as contained in the proposed amendments to Section 8(a).

2. A further area of abuse of the Section 8(c)(23) wage loss concept of permanent disability is exhibited in the number of filings which coincide with retirement age. I am handling a case involving a 62-year-old gentleman who was laid off, along with the total work force, due to an employer going out of business. The claimant, who alleged permanent and total disability due to pulmonary and psychiatric illness from the day following his layoff, and who at the same time was receiving unemployment compensation and had applied for employment in two other shipyards, candidly admitted to an examining physician that following the layoff, he had been visited by a union official who urged him to file a compensation claim with a promise that he would be able to retire on two-thirds of his pay and was further told, "What do you have to lose?" Another case brought to mind was that of a 64-year-old shipfitter who advised his employer in August of 1975 that he was going to retire on December 15, 1975, his 65th birthday. He retired December 15, 1975. On December 17, 1975, he filed a claim alleging that he was totally disabled due to a plethora of medical problems including chronic bronchitis. Claimant admitted to no change in condition between December 15 and December 17. Defendant's examining physicians found there to be no industrially related problems and indeed no physically disabling problems. Claimant's physician, on the other hand, found him to be totally disabled due to high blood pressure caused by noise and chronic bronchitis due to breathing fumes (but not to his lifelong tobacco smoking). On cross-examination, the claimant's physician produced x-ray reports and laboratory reports from his file, all of which were interpreted by such facilities as normal and all of which were totally contrary to this physician's own conclusions allegedly drawn therefrom. The trial judge ignored all of the lengthy medical reports and direct and cross medical examination. Relying upon a "To Whom It May Concern" letter authored by a general practitioner stating, "This patient is disabled because of chronic bronchitis" and contained in a voluminous subpoenaed medical file, the trial judge determined that the claimant was permanently and totally disabled due to industrially caused chronic bronchitis. However, the employer was afforded Section 8(f) (Special Fund) relief, and such fund to this date is paying the man a comfortable retirement pension, and it will be paying his wife if she survives him.

The Department of Labor's Office of Workers' Compensation Programs and the courts entertain the fiction that wage earning capacity and presumed loss of it due to industrial causation continues beyond retirement age and into the hereafter: heaven plus an annuity.

The proposed amendments appropriately put an end to this myth and hopefully this type of claim by changes in Section 8(c)(23) (benefits not payable after minimum age for mandatory retirement) and Section (redesignated) 8(g). Section 8(g) addresses the situation in which the employee voluntarily limits his income and further, places burden of proof on the employee to establish that wage loss for which compensation is sought is the result of the compensable injury.

The same problem, with respect to award of permanent and total disability, is partially rectified (assuming the application of proposed Section 8[g] is limited to cases of "partial disability"; by the proposed change to Section 8(a) which limits payment to the minimum age for mandatory retirement and by the elimination of the survivorship of disability benefits by the elimination of the concept of survivorship of permanent partial and permanent total disability benefits through the device of dying from "causes other than the injury."

3. The prevalent practice of active resistance by "wage loss" claimants to rehabilitation efforts contravenes congressional intent.

During periods of medical recovery during which temporary disability benefits are being paid, physicians and employers frequently encourage employees to attend school to improve language skills, etc. It is the rare circumstance in which such efforts prove fruitful.

Not infrequently, claimants, when attempts are made to evaluate their skills and aptitude for purposes of employment placement or, in the alternative, retraining, behave in an obstreperous manner toward the examining personnel and apparently purposely underachieve in testing (failing in skills unimpaired as a consequence of injury and which skills were aptly applied preinjury). (See Exhibit "B" attached.) Furthermore, it is the rule, rather than the exception, that an employee pursuing a "wage loss" claim and who, for one reason or another, cannot be put back to a lighter job, refuses a reasonable retraining program. Exhibit "C" attached reflects the case of a young man with a tenth grade education and unimpressive IQ rejecting any and all attempts at job placement or any retraining program short of law school.

In my seven years of working almost exclusively with claims arising under this Act, I have seen two employees having nonscheduled permanent and partial disability successfully complete schooling and return to work in the open labor market. On reflection, this is almost shocking to me but the validity of which experience is perhaps borne out by a recent public statement made by the Deputy Commissioner of the 13th Compensation District at a longshore seminar. He stated that during the year 1980 in the combined 13th and 18th Compensation Districts (and which districts have 7,000 to 11,000 lost time claims, depending upon what statistic is believed), there are "10 to 20" Department of Labor sanctioned rehabilitation programs completed. This works out to less than 2/10 of 1% of all lost time injuries. Of course, all lost time injuries do not result in cases requiring rehabilitation nor resulting in claims made on a wage loss theory. The statistic likewise does not reflect employer-instituted rehabilitation plans. But taking all of that into account, it, by and large, substantiates my own experience.

Indeed, when the Department of Labor refers apparent candidates for rehabilitation to the Department of Labor's specialists, the claimant almost always commences with a recitation of how they are disabled and can't do anything. This results in a short report from the rehabilitation specialist bearing the stamp "Nonfeasible."

Most employers and all large employers with whom I am acquainted have programs designed to reemploy employees recovering from the effects of industrial injuries (sometimes referred to as light work programs) and on-the-job work or training programs designed to retrain to other jobs, an industrially limited employee.

These programs are, as often as not, seriously compromised by the injured employee's refusal to perform the lighter task or to claim inability to perform work within medical limitations imposed by the treating physician. The employer, concerned with consequent potential liability for continuing temporary disability benefits, provides increasingly simple tasks to the employee. Ultimately, the employer provides make-work projects such as picking up papers with a stick or watching the parking lot. The effect is the creation of a class of injured untouchables who soon consider themselves to have a type of super seniority. In the long term, this attitude, and the employer's attempt to accommodate to it, adversely affects the morale of the motivated injured and noninjured employees. Productivity goes down.

The proposed change to Section (g) (redesignated as 8[f]) provides in part, "...If an employee unreasonably refuses to undergo vocational rehabilitation, the employee shall not be eligible to receive compensation payments that would otherwise be payable for the period of such refusal. Lack of desire to participate in vocational rehabilitation alone shall not be a reasonable basis for refusal to so participate."

This is good as far as it goes.

However, it may be appropriate to specifically refer to rehabilitation in the section which provides for the determination of earning capacity, redesignated Section 8(g) previously discussed. Perhaps that provision could be further expanded to read in part:

> "If an employee voluntarily limits his income, or fails to accept and complete suitable rehabilitation program, or fails to accept employment commensurate with his abilities, the wage earning capacity of the employee shall be considered to be the amount which would have been earned if the employee did not limit his income, or fail to accept and complete suitable rehabilitation program,

> or if the employee accepted appropriate employment..."

Likewise, assuming that the proposed Section 8(g) applies only to the evaluation of "partial disability," then the amendments do not address the lack of employee rehabilitation participation on the ultimate issue of permanent total disability. Indeed, it is that potential class of injured employees who most seriously require rehabilitation efforts.

4. The proposed amendments to Section 8(c)(13) pertaining to loss of hearing reflects detailed analysis of the evaluation of this potentially enormous industrial risk. That amendment includes Section (c)(13)(8)(A) which states: "No consideration shall be given to the question of whether or not the ability of an employee to understand speech is improved by the use of a hearing aid."

The employer, of course, has the obligation to provide such employee with a medically recommended hearing aid pursuant to the provisions of Section 7. If as a result of this employer expenditure, the employee is able to have improved hearing, why should not the employer be entitled to a break? Is not the idea of self-administration predicated upon the concept that it is good business to do that which Congress proposes?

Under the practice utilized under the California workers' compensation system, a rating for hearing loss may be reduced by one-half the difference between hearing with the aid and hearing without the aid. Experience indicates that this serves as an incentive for the employer to provide optimum hearing aids and which serves the object of this legislation as set forth in proposed redesignated Section 8(f) wherein it states in part, "...Since the primary purpose of this Act is to return employees to productive and useful employment..."

5. Section 8(c)(5) provides, "Eye loss, 160 weeks compensation." Subsection 16 provides: "Binocular vision or percentum of vision: Compensation for loss of binocular vision or for 80 percentum or more of the vision of an eye shall be the same as for loss of the eye."

Currently, there is a division in the Court of Appeals, as there is within the states, as to whether loss of vision should be predicated upon loss of corrected vision (Washington Terminal Co. v. Hogue, 79 F.2d 158 [1935]), or whether it should be determined upon uncorrected vision as apparently espoused by the Court of Appeals in Gulf Stevedor Corporation v. Hollis, 400 U.S. 831 (1969), Cert. denied, 298 F.Supp. 426, 427 F.2d 160.

This issue was argued by this writer before the Court of Appeals, Ninth Circuit, (in a case currently on remand on a collateral issue) and at which time, the attorney for the Director argued that it was the Department of Labor's position that rating of loss of vision should be based upon uncorrected vision, that attainable without eye glasses or other corrective lenses.

The Court of Appeals in Hogue at 79 F.2d 158, 161 stated in part:

> "The use of eye glasses as an aid to vision is so commonly understood and employed that no person would be considered as having lost 80% of his vision if at the same time, with the use of glasses, he would possess 50% of normal vision. Therefore, according to the reasonable construction of the statute, it should be held that one possessing 50% efficiency of vision in an injured eye when using glasses cannot be classified as having lost the use of 80% of the vision of such eye...."

In that it appears that Congress is making a thorough overhaul of the Longshoremen's and Harbor Workers' Compensation Act, it seems appropriate that it should address the resolution of issues upon which the courts and the Department of Labor are at odds.

In conclusion, I appreciate this committee's grasp of problems existent in the application of the provisions of the Longshoremen's and Harbor Workers' Compensation Act and its well thought-out efforts at resolving these problem areas.

Lastly, I thank this committee for this opportunity to participate in this deliberation.

Respectfully submitted,

William H. Taylor
William H. Taylor

WHT/jc
Enclosures

mental condition part of the on-going legal matter. So I still think it's a legal matter and has to be resolved between the two of you.

MR. TAYLOR: I'm trying to save time. I was going to propose that you read your notes, but they are so voluminous that you could spend a half an hour, forty-five minutes reading them. I thought it would be much simpler, since you state that they are dictated by yourself and are accurate, that they just be appended as an exhibit.

Anyway, counsel, I would so move that this be attached as an exhibit.

MR. [redacted]: You have already done it.

(The progress notes of [redacted] were marked exhibit A by the court reporter.)

MR. TAYLOR: All right. Well, I'll ask the reporter, with the doctor's permission, to make copies of the exhibit to the deposition.

MR. [redacted] I'm objecting to that. The reporter has no power to do that so long as I object to their inclusion. You and I have to go either before and ALJ or in Department Four or Five and get the matter resolved, where there is objection taken to things in the course of the deposition. You are asking the reporter to take on authority that the reporter does not have.

BY MR. TAYLOR:

Q Well, Dr. Griswold, I ask that you would read your notes in chronological order.

MR. [redacted]: Excuse me. Doctor, do you have any objection under your obligation as a physician to reading the notes that you have as requested by Mr. Taylor?

THE WITNESS: No.

MR. [redacted]: All right. In that case I will withdraw my objection.

MR. TAYLOR: To the notes?

MR. [redacted] Yes.

MR. TAYLOR: All right.

THE WITNESS: You don't want me to read them?

MR. [redacted]: Let me correct the record. I am withdrawing my objection as to the reporter making a copy of the notes and attaching them to the deposition with an identification number. In other words, in view of the doctor's position and in view of the time involved, I would agree to allow the notes be copied by the reporter and marked for identification and attached to the deposition. I'm still objecting to them being admitted as an exhibit to the deposition, and I think that's a question of law that nobody here can answer. It can only be resolved either at the time of hearing or at the time of motion on that particular question.

MR. TAYLOR: Would it be agreeable to have the notes attached as they are; namely, copies of Dr. Griswold's notes on his office visits?

MR. [redacted]: Attached and marked as an exhibit but with my objection as to their admissability.

MR. TAYLOR: All right.

BY MR. TAYLOR:

Q Dr. Griswold, as I have read your notes, would it appear that, at least since mid-summer of 1977, Mr. [redacted] has told you that he has been engaged in buying and selling of antique merchandise? Isthat right?

A. Yes.

Q Does he appear to be truthful in relating that history to you?

A. He appears to be.

Q You have also recorded numerous entries that he's making upwards of $200 a week in this endeavor; is that right?

A. He's told me that from time to time.

Q Do you believe from a psychiatric standpoint there has been any medical contraindication to such activity on his part?

A. No. I thought it was good treatment, good therapy for him to keep involved, occupied.

Q Is that generally accepted therapy--namely, work activity--as therapy for depression?

A. Yes, it is.

Q Have you given him advice at any time; namely, that he should not work?

A. It was my recommendation that he not work at his former occupation as a welder at the National Steel Company.

Q I take it you have not told him not to work as a welder at any other location?

A. No.

Ex A - 3

[redacted]

PROGRESS NOTE

1/30/78 One hour of psychotherapy

This patient's condition remains essentially the same and he presents no particular complaints. He continues to maintain his improvement. He mentions that he received a communication from the rehabilitation dept indecating that they had been notified by Social security to contact him in regard to vocational retraining. He is not interested in this type of activity in as much as if and when he is ready to return to work he has his welding trade to depend on. In any event he doesn't anticipate going back into welding but hopes to get involved in buying and selling used antique furniture and possibly in the opening of a store with his wife. He was advised to reply to the letter along this general veign. He mentions that his case will be coming up before the longshoreman's Union on the 1st of the month and then the workman's compensation board some time in the future period. As usual he spoke in a rambling fashion about his interest in antique furniture and other items for resale. He mentions that since the 1st of the year he has made $1100 in this manner. His attorney has advised him to keep a low profile for the next two months and to avoid ~~x~~ being seen as active at swap meets and auctions. Therefore he will be allowing his wife to act in his place. He also spoke at some length about his house and yard where he has numerous fruit trees and rose bushes. Things at home continue to go along quite smoothley and he and his wife are having no particular conflict at this time. She is scheduled to start work on the 1st of the month. In general he appears to be doing quite well at this point.

W.R. GRISWOLD M.D.

Ex A - 4

[redacted] Progress Note

2/6/78 1 hour psychotherapy.

This patient's condition remains about as usual and he presents no particular complaints. He indicates that he is taking his medicine as directed and as long as he does this he feels quite comfortable. He is abiding by his lawyers recommendation and not attending the swap meets or auctions but is sending his brother instead. He has been spending his time repairing various appliances such as toasters and coffee makers. He is concerned though that there may be pressure brought to bear to force him to sell his house in order to pay off his debts. He will be going to court in regard to this on wednesday. He spoke in a rambling fashion about his swap meet acitvities in the past and how he was able to make $200 or more a week in this endeavor. His wife is now working part time in a yarn shop in Chula Vista and of course they can use the money. In general he appears to be doing quite well and does not appear to be particularly depressed at this time.

W.R. Griswold, M.D

WRG:
tjh

[redacted] Progress Note

12/13/78 1 hour psychotherapy

This patient continues to evidence gradual improvement and presents no particular complaints at this time. He mentions that he spoke to his attorney as to when his hearing would take place and was assured that it would be some time in the relative near future. Otherwise, he may be required to sell his house to satisfy some rather small debts. During the recent rains he has spent his time sorting out the various items in his garage and patio and also recently sold 30 toasters for 3 dollars a piece to a Mexican who resells them in Tijuana. As per the instructions of his attorney he is no longer attending the swap meets ~~a~~but hopes to get back into this endeavor later on. His wife continues to work at the~~d~~ yarn shop and is glad to have something to do. He spoke at some length about his younger brother who absconded with the funds from his mother's estate. He indicates friends of his have seen him on Skid Row in San Diego. He describes his brother as being a homosexual and never being "any good". He recalls how ~~h~~ as a boy at home he used to dress in their mother's clothing and enjoyed playing with girls most of the time. He indicates this brother slept with the mother until he ~~x~~ was about 20 years of age. He mentions a recent dream in which he beat up on the brother and then cooked him ~~x~~ in a large pot but awakened just prior to taking a bite of him. It was suggested that this no doubt represents the extreme hostile feelings he entertains toward his brother but it is extremely doubtful that he would go to this extreme if ever confronted by him. In general this patient appears to be doing fairly well at this time but his condition would certainly be enhanced if his case could be settled in the near future.

W.R. Griswold M.D.

regain

[redacted] • P.O. Box 33351 • San Diego, California 92103 • (714) 298-7479
3020 Reynard Way

October 31, 1978

TO: R.L. Kautz & Company
1094 Cudahy Place
San Diego, CA 92110

ATTN: Carmen Gil
Claims Manager

Your File No. 0336 76 0132

REGAIN File No. H-114

RE: [redacted] Scott

REPORT NUMBER 11

Purpose: Case Synopsis

On September 23, 1977, I contacted Mr. Scott to schedule him for Vocational Testing in the following week. Mr. Scott said he had a doctor's appointment and anticipated hospitalization. Mr. Scott agreed to contact REGAIN following the doctor's appointment.

On October 3, 1977, contact was attempted. As Mr. Scott's telephone was disconnected, a Mailgram was sent to establish a testing date for October 13 and 14, 1977.

Mr. Scott confirmed this appointment on October 11, 1977.

On October 13, 1977, Mr. Scott did not show up for his 2:30 p.m. appointment.

On October 14, 1977, Mr. Scott did not show up for his appointment. However, his wife contacted REGAIN offices, inquiring the testing time. She said Mr. Scott had not told her of the

COPY

NOV - 7 1978

EXHIBIT "B" PAGE 1

October 13, 1978 appointment, and that this was typical if she did not directly make arrangements. The testing was rescheduled for October 19 and 20, 1977.

Mr. Scott arrived on time for his October 19, 1977 appointment. Although his wife estimated Mr. Scott's working time as one hour, Mr. Scott worked without complaint for two to two and one-half hours. Mr. Scott was given Interest Surveys to complete prior to his appointment on October 20, 1977.

Mr. Scott arrived on time for his October 20, 1977 appointment. The Interest Surveys were not complete, as Mr. Scott said he had a "Headache". The surveys were returned to Mr. Scott with a self-addressed stamped envelope to REGAIN. I instructed Mr. Scott to complete the work and return in 48 hours.

On October 28, 1977, I contacted Mr. Scott to determine if the surveys were in the mail. Mr. Scott offered as a reply that his family was sick. Inquiry on November 9, 1977, resulted in Mrs. Scott stating she had been in the hospital, but would check the surveys that night. November 16, 1977 contact produced an identical promise.

Mr. Scott's Interest Surveys were received in REGAIN offices on November 19, 1977, one month after the 48-hour return request. Additionally, the surveys were not completed correctly.

On December 9, 1977, I contacted Mr. Scott to schedule an appointment to discuss the vocational testing results. Mr. Scott said he felt terrible and his wife related he had had a black-out and was scheduled to see a psychiatrist on December 13, 1977. No appointment with REGAIN was made.

Mr. Scott was scheduled to attend Work Adjustment at San Diego State University Rehabilitation Center on January 30, 1978. I contacted the Scott residence on January 27, 1978 to relay the appointment.

On January 30, 1978, Mr. Scott did not appear for his appointment. Contact with Mrs. Scott on February 1, 1978 revealed Mr. Scott did not feel well and "He did feel like it"(Keeping the appointment). During this conversation, Mrs. Scott related that Mr. Scott is harmful, as he started a fire in the middle of the living room floor because he thought it was the fireplace.

Mr. Scott was rescheduled for Vocational Adjustment on April 10, 1978. Notification of appointment was sent to Mr. Scott by Attorney Taylor's office.

On April 10, 1978, Ms. Crossley of San Diego State University Rehabilitation Center contacted REGAIN offices at 8:45 a.m. to relate that Mr. Scott had not appeared for the appointment. Mr. Scott did appear for his 8:00 a.m. appointment at 9:30 a.m., stating he had gotten lost.

Mr. Scott's behavior for the four days was related as follows: On Monday, Mr. Scott was late to start his work adjustment and late after lunch, in that he missed the World of Work tour. On Tuesday, Mr. Scott was there on time; however, he took a two-hour break in the afternoon and worked extremely slowly. Wednesday, Mrs. Scott called in and said Mr. Scott was ill and unable to attend. On Thursday, Mr. Scott took his lunch break and took another break at 1:10 p.m., returned at 2:45 p.m. and clocked out at 3:00 p.m. His work is slow, and it is not apparent that Mr. Scott is making any progress.

On April 14, 1978, Diane Crossley of San Diego State Rehabilitation Center contacted REGAIN offices stating that Mr. Scott is either unable or intentionally not doing what he is told to do. On this particular day, Mr. Scott went to make a phone call at 10:45 a.m. and did not return to his working station. Mr. Scott did not notify anyone as to his departure.

On April 17, 1978, San Diego State Rehabilitation Center contacted REGAIN offices relating Mr. Scott had not appeared for the commencement of his second week of work adjustment. Notifification of Mr. Scott's not appearing for work adjustment was not received.

On Aprul 24, 1978, the Rehabilitation Center contacted REGAIN offices stating Mrs. Scott had contacted the center and said Mr. Scott was very sick and depressed. She stated that his doctor does not want him to come for another week to work adjustment.

Subsequently, Mr. Scott was rescheduled for vocational adjustment on May 1, 1978, but did not appear for the appointment.

On May 8, 1978, Mr. Scott appeared at San Diego State Rehabilitation Center for his "Appointment". He told Ms. Crossley he was trying to cooperate and really does have a good memory but forgets important things.

On May 16, 1978, Mr. Scott arrived for his 8:30 a.m. appointment at 8:50 a.m. to again commence a vocational adjustment. Mr. Scott was informed that the schedule was from 8:00 a.m. to 3:00 p.m.

On May 17, 1978, Mr. Scott arrived at 8:50 a.m.; May 18, 1978, Mrs. Scott called the Center at 9:30 a.m. to state he would not be in as his car was being repaired; May 19, 1978, Mr. Scott arrived at 9:14 a.m. and clocked out at 11:04 a.m.; May 22, 1978, arrival was at 9:55 a.m.; May 23, 1978 - 9:25 a.m.; May 24, 1978, - 8:45 a.m.; May 25, 1978, - 8:57 a.m.; May 26, 1978, - 9:01 a.m.

The above does not reflect similar behavior throughout the two-week period as documented in the Rehabilitation Center's report dated June 6, 1978.

As Mr. Scott completed the vocational assessment, arrangements were made to do a vocational evaluation. Mr. Scott was scheduled for appointments on July 31, 1978. Mr. Scott called REGAIN offices stating he had a headache. I instructed him to appear on August 2, 1978.

Mr. Scott did not appear for his August 2, 1978 appointment, nor subsequent appointments on August 21, 1978, and October 2, 1978. Mr. Scott was notified of the appointments by mail by REGAIN and Attorney Taylor's office.

No further work is being planned until further carrier/attorney authorization.

Bonnie SinClair
Vocational Specialist

Nancy Jensen, M.S.
Certified Rehabilitation Counselor

BSC:NJ:mw Ex [redacted] - 4
cc: Attorney William Taylor

SAN DIEGO STATE UNIVERSITY
SAN DIEGO, CALIFORNIA 92182
(714) 560-1363

COUNSELOR EDUCATION
Rehabilitation Counselor Program

June 6, 1978

Ms. Bonnie SinClair
REGAIN
3356 Second Avenue, Suite B
San Diego, California 92103

Re: [redacted] Scott

Dear Ms. SinClair:

Mr. Scott began his two-week situational assessment program on April 10, 1978. As we agreed, the overall purpose of this program was to assess the client's feasibility for training, physical stamina, dependability, performance ability, and attitude. Mr. Scott's schedule was as follows:

> Monday through Thursday, 8:30 a.m. - 3:00 p.m., with two 15 minute breaks and one-half hour lunch period from 12:00 to 12:30 p.m.
>
> Friday, 8:30 a.m. to 12:00 noon, with one 15 minute break.

On April 10, 1978, Mr. Scott arrived at the Center at 9:30 a.m. for his scheduled 8:30 a.m. orientation. Once he was informed of his responsibilities, the purpose of the situational assessment program and given a tour of the Rehabilitation Center, he was placed on his first job. This sit-down job involved routinely removing excess glue from a paint can collar. He worked on this job for one-half hour prior to lunch break. He returned from lunch on time.

From 12:30 to 1:00, Mr. Scott was placed on a sit-down task which required use of both hands in placing a plastic snap ring over a plastic cylinder. At 1:00, a World-of-Work tour had been scheduled for all clientele in the work adjustment area. This counselor had informed Mr. Scott twice regarding when and where the van would be leaving for this tour. Mr. Scott returned to the adjustment area at approximately 1:10 p.m. to inform staff members that he had missed the van. Because the work load is scheduled around such events as the World-of-Work tour, it was necessary to send Mr. Scott home.

Mr. Scott was punctual on April 11, 1978. He began the day by working on a task which involved applying tennis grips to plastic cylinders. The task requires the use of upper extremities in a standing position. Mr. Scott was able to work on this for 35 minutes before he complained of pain in his neck. He took an unauthorized break which made it necessary to inform Mr. Scott that it was his responsibility to notify the

Ex B - 5

JUN 23 1978

THE CALIFORNIA STATE UNIVERSITY AND COLLEGES

floor supervisor of his whereabouts. He was then placed on a sit-down task which required use of both hands in placing a plastic snap ring over a plastic cylinder. After 45 minutes of work, Mr. Scott complained of pain again. He was allowed to lie down at 11:15 a.m. in the first aid room during the 1-1/2 hour break he took from the work station. Mr. Scott returned to the same job at 1:45 p.m., stating, "It didn't matter what job I do as the pain is always present. One task does not aggravate it more than another." He returned from his afternoon break on time. At 2:30 p.m., Mr. Scott was assigned to a standing position job that required the use of his upper extremities. This job involved assembling a cardboard shipping box and taping one side of the box, using an automatic tape dispenser. Mr. Scott clocked out at 3:00 p.m.

The next day, April 12, 1978, Mr. Scott was absent. His wife notified this counselor that Mr. Scott was sick and would be going to the doctor that day.

On April 13, 1978, Mr. Scott arrived seven minutes late to work. He was assigned to one task for the entire day. This task involved Mr. Scott checking the quality of work of four pamphlets that had been collated and inserted into a cardboard envelope. It required Mr. Scott to be in a sitting position using both hands. Mr. Scott was ten minutes late in returning from his morning break and he also forgot to clock out for lunch. He returned promptly from lunch at 12:30. At 1:10, he requested to take his medication and lie down. He returned from the first aid room at 2:45 p.m. and worked on the above mentioned task until 3:00, when he clocked out for the day.

Mr. Scott was 30 minutes late on April 14, 1978, stating that his car had run out of gas. He was assigned to the same task as the day before. At 10:45 a.m., Mr. Scott received permission to make a phone call, left to make the call and then returned to his work station at 10:50 a.m. Within 15 minutes, Mr. Scott was absent from the station again and did not turn in his production record which records his completed work for the day. This counselor checked the building at 11:10 a.m. and was unable to locate Mr. Scott.

On April 17, 1978, Mr. Scott was absent. This counselor called his home, but the phone had been disconnected. Mr. Scott's wife called on April 19, 1978 to inform the staff that Mr. Scott had been sick on April 17th, 18th, and would be absent on the 19th. On April 20 and 21, 1978, Mr. Scott was absent with no reason given.

During the week of April 24th, it was agreed between REGAIN and this counselor that Mr. Scott would return for another two-week period beginning May 1, 1978. On May 1st, Mr. Scott failed to appear. Both Ms. SinClair and myself were present at 8:30 a.m. to meet with Mr. Scott. No phone contact was made by Mr. Scott to the Center regarding his absence. On May 2nd, termination was agreed upon with REGAIN after Mr. Scott again failed to appear. On May 8, 1978, Mr. Scott arrived at the Center at approximately 8:35 a.m. with his understanding that he was to begin his

JUN 23 1978

situational assessment program on that day. Because he was unauthorized by REGAIN to start on that day, it was necessary to have Mr. Scott leave with the understanding that he would call the following day to learn of a possible new start date.

Contact was made to Ms. SinClair by this counselor and it was decided to begin the program again on May 16th. Mr. Scott's wife called this counselor on May 10, 1978 and was given the new start date.

Mr. Scott arrived at 8:40 a.m. on May 16, 1978, to meet with Mr. Jim Tunstall, Vocational Adjustment Supervisor, Ms. Bonnie SinClair, REGAIN counselor, and this counselor. Re-explanation of his responsibilities (i.e., attendance, calling in when absent, notifying supervisor when taking a break, punctuality, keeping tally of his completed work, etc.) was given by this counselor to Mr. Scott. At 9:30 a.m., Mr. Scott was placed on a job which required him to place a self-adhesive address label onto a brochure. This job is a single person, sit-down one that is repetitive and requires average finger dexterity. He returned from his morning break on time. Mr. Scott worked on this job until 1:00 p.m. when he was assigned to another job. This job required Mr. Scott to be in a standing position while repetitively collating six pieces of paper, placing them into an envelope and closing the envelope. After 50 minutes, Mr. Scott requested to lie down in the first aid room and did not return until 3:10 when he clocked out to go home.

Mr. Scott arrived at 8:50 a.m. on May 17, 1978, stating that he was late because it was necessary for him to get his children off to school first. This counselor suggested Mr. Scott take the San Diego State University Rehabilitation Center van in order to assist him in getting to work on time. It appeared that Mr. Scott was interested in this possibility, so instructions were given to him in regards to time and place of pick-up. Mr. Scott was placed on the above mentioned job of applying snap rings onto a plastic cylinder at 8:50 a.m. It was observed that at 9:10 a.m., he left his work station for three minutes without permission. At 10:00 a.m., Mr. Scott requested to take his medication and returned immediately to work on a new job. This job required Mr. Scott to collate five pieces of paper determining the sequence of the materials and stapling them together. This job was performed individually in a sit down position. Mr. Scott returned from break on time. At 11:30 a.m., Mr. Scott requested to take a break to lie down and did not return until 2:50 p.m. Mr. Scott commented to Ms. Lynda Cryer, Floor Supervisor, that next time she shouldn't let him stay in the first aid room so long. At 4:25 p.m., after clocking out at 3:00 p.m., Mr. Scott appeared in the adjustment area to inform the staff that he didn't know if he would be present on May 18, 1978. The reason that was given was that his wife had been involved in a car accident that afternoon.

On May 18, 1978, at 9:30 a.m., Mr. Scott called to report that his car was being repaired and he would not be in, but would report to work on May 19, 1978. On May 19, 1978, Mr. Scott arrived at 9:14 a.m., with his reason for being late to lack of transportation. He was assigned to a sit-down

JUN 23 1978

individual job that required the use of his upper extremities. The degree of judgement was minimal on this task as it only required the worker to strip excess plastic from two pieces of plastics that had been die-cut. At 10:10 a.m., Mr. Scott left his work station for two minutes without permission. He returned from the 10:15 a.m. break on time. At 10:57, he again left without permission for approximately two minutes At 11:04 a.m., he requested to leave the work stationto lie down. When this counselor asked Mr. Scott what was wrong, he responded with, "Everything, my back, my neck, my leg." He clocked out for the day and went to the first aid room.

At 9:55 a.m. on May 22, 1978, Mr. Scott arrived at the Center to inform Ms. Cryer that he had initially planned on not attending because he was not feeling well, but then once up and moving around for the day, he decided to come. He was assigned to the self-adhesive letter labeling job described in the above narrative. He returned from the morning break two minutes late. At 10:37, he walked off the work floor without permission and returned at 10:43 a.m. This counselor observed Mr. Scott returning again to his work station at 10:54 a.m., but the time he initially left was unsure of. At 10:55 a.m., Mr. Scott requested to lie down in the first aid room and returned at 1:40 p.m. At 1:40, he was placed on the above mentioned snap ring job and worked on this for one hour. He returned from the 2:00 p.m. break on time. At 2:34 p.m., the floor supervisor observed Mr. Scott to be sitting at his work station with his work completed. It was necessary to place him on a new job starting at 2:40 p.m., which involved the above mentioned stripping of excess plastic. He worked on this job until 3:00 when he clocked out to go home.

Mr. Scott arrived at the Center at 9:25 a.m. on May 23, 1978. He was placed on the job of applying snap rings onto the plastic cylinder. This counselor at 10:50 a.m., asked Mr. Scott why he was late. Mr. Scott said that he had forgotten his medication and needed to return home for it. He then commented that he was doing the best he could. Mr. Scott returned from his 10:15 a.m. break on time. At 11:57, Mr. Scott informed the floor supervisor that he needed to leave to take his medication and then lie down. Ms. Cryer told Mr. Scott to return at 12:30 p.m. Mr. Scott did not return at 12:30 p.m. At 1:10 p.m., Ms. Cryer went to the first aid room and had Mr. Scott return to his work station. Mr. Scott worked on a sit-down, individually performed job that required the use of his hands in folding four sheets into thirds for insertion into an envelope. He worked on this job up to the afternoon break, returned from break on time and worked until 3:00 p.m.

At 8:45 a.m. on May 24, 1978, Mr. Scott reported to work. He was placed on a job that required him to be in a sit-down position using his hands in collating four sheets of paper, interchanging the third and fourth sheets. He worked on this until he left his work station at 9:55 a.m. to take a break and did not return until 11:08 a.m. At 11:08 a.m., he returned to the same job, worked until noon, returned promptly at 12:30 p.m., and completed the job at 1:15 p.m.

JUN 23 1978

He was then assigned to the folding job he had previously done on May 23, 1978 and worked on this until 2:00 p.m. when it was necessary for Mr. Scott to leave the Center for a scheduled doctor's appointment. Mr. Scott informed the floor supervisor of this appointment earlier in the work day.

Mr. Scott arrived at 8:57 a.m. on May 25, 1978. He worked on the folding job for the entire day. It was observed that at 10:08 a.m., Mr. Scott left the work floor without permission to take his medication and returned at 10:10 a.m. He returned from his 10:15 a.m. break on time, but then again left at 11:04 a.m. for the first aid room. He did not return from the first aid room until 1:51 p.m. He returned from his afternoon break on time. He left at 2:30 p.m. to take his medication and returned at 2:45 p.m. He completed the work day by working on the same job.

On May 26, 1978, Mr. Scott reported for work at 9:01 a.m., and was placed on the same job as the previous day. He returned from his morning break on time. At 11:05 a.m., Mr. Scott reported that he had a headache and could not continue working. He left his work station to take his medication and then reported to the first aid room, not to return to work until 11:26 a.m. He again left his work station at 11:40 a.m. and returned in time to clock out for the day.

Mr. Scott completed his second two-week situational assessment on May 26, 1978. As documented above, Mr. Scott's dependability in terms of punctuality and daily attendance did not meet an employer's expectations. Improvement was seen though in his daily attendance when comparing his second two-week program to his first. Even though Mr. Scott did show daily improvement in his completed quantity of work per hour on different assigned tasks, his productivity, averaging at $1.12 per hour, was below competitive standards.

Physically, Mr. Scott's tolerance to work a full day did not meet competitive expectations. No attempt is made to predict if these daily rest breaks were actually necessary in order for Mr. Scott to complete the work day. Mr. Scott was able to perform all assigned tasks, had no difficulty understanding instructions, and willingly adapted to any change in assignments. It was observed by this counselor that once Mr. Scott was familiar with the work surroundings, he was congenial in his interaction with co-workers and supervisors.

Thank you for the opportunity to work with you and Mr. Scott. If you have any questions, please feel free to contact me.

Sincerely,

Diane Crossley, M.A.

Diane Crossley, M.A.
Vocational Adjustment Counselor:klr

regain

3020 Reynard Way
San Diego, California 92103
(714) 298-7479

3833 Jurupa Avenue
Riverside, California 92506
(714) 788-8620
(714) 825-9462

8060 E. Florence Avenue
Downey, California 90240
(213) 928-5516
(213) 927-8323

April 21, 1981

TO: R. L. Kautz & Co.
1094 Cudahy Place
San Diego, CA 92110

ATTN: John Rigo
Claims Supervisor

CLAIM #: 0336-77-0346
0336-78-0021

REGAIN #: H-595

RE: [redacted]

EMPLOYER: NASSCO

REPORT NUMBER 4

Purpose: (1) Discussion of Vocational Alternatives
(2) Suspension of Further Rehabilitation Work

On April 9, 1981, at the request of NASSCO and following vocational labor market survey exploration, Regain Vocational Specialist, Kay Chambers, phoned Mr. [redacted] to set appointment to meet with him to discuss vocational alternatives. During this conversation, Mr. [redacted] expressed his resentment over a recent Regain report he had read at his physician's office. He felt that it was a negative and inaccurate report. It was suggested by this specialist that he bring this up in the meeting set for April 16, 1981 at 9:00 A.M. with Regain Specialist and Counselor, Nancy Jensen.

On April 16, 1981, Mr. [redacted] arrived (accompanied by his Mother) at the Regain offices at 9:15 A.M. to meet with this specialist and Nancy Jensen. His Mother was not present during our meeting. A review was made of the report Mr. [redacted] had questioned (Testing Evaluation Report dated 1-19-81), and Ms. Jensen pointed

MAY 01 1981

Exhibit "C" - 1

A Vocational Rehabilitation Service

MAY 04 1981

Page -2-
April 21, 1981
TO: R. L. Kautz & Co.
RE: [redacted]

out that she felt the evaluation was accurate as Mr. [redacted] had in fact been "loud" and "verbal" at the time of testing. She also explained that the statement "He was not observed to be in any physical discomfort during the testing" was in fact not a medical opinion but merely the observation of the testor.

An initial attempt was made to explain to Mr. [redacted] Regain's position of assisting him with job seeking skills as well as job search assistance. At this time, Mr. [redacted] interrupted and stressed that he deserved a "law certificate" or at least a four-year college program, and it was "owed" to him.

Vocational Specialist Chambers attempted to explain again the role of the rehabilitation agency but was unable to do so as Mr. [redacted] was sobbing loudly. Nancy Jensen, Regain Counselor, repeatedly attempted to suggest vocational alternatives for Mr. [redacted] based on a recent labor market survey done in his behalf.

These alternatives were arrived at through consideration of Mr. [redacted] physical limitations, testing results, interests, abilities, aptitude and past work experience. The following job titles were included in the labor market survey: Materials Chaser, Mail Room Clerk, Welder, Fabricator, Deburrer, and Furniture Sales Person.

Mr. [redacted] rejected each suggested vocation and continued to insist that he wanted formal training that would qualify him to practice law or something on a similar professional level. He stressed that to accept anything less would not appear equitable. Ms. Jensen encouraged him to enroll in a college course if he so desired and offered Regain's resources to assist him in locating a job (as outlined in the labor market survey) that could support him during this undertaking. Mr. [redacted] also rejected this suggestion.

Mr. [redacted] repeatedly pointed out that he was completely capable of getting a job along the lines suggested in the labor market survey and would not need the assistance of Regain. He also stated that his wife could write a resume and could, in fact, get him a clerical job if he so wished. He requested that the Regain agency make a recommendation to his former employer that they finance four to seven years' college training.

Ex C - 2

MAY 01 1981

Page -3-
April 21, 1981
TO: R. L. Kautz & Co.
RE: [redacted]

When questioned as to what other vocational alternatives he might be interested in, Mr. [redacted] stated he would enjoy dancing. He informed us that he had experience as a nude dancer, enjoyed this experience, and stated that it was a very lucrative field. However, he did feel that his back injury would definitely be a deterrent to his success as a nude dancer. He was unable to come up with any other vocational alternatives outside law.

Regain Summary

Mr. [redacted] appeared to be quite agitated during this meeting with frequent outbursts of anger and tears. After an hour of discussion, it was determined by Ms. Jensen and this specialist that, based upon Mr. [redacted] attitude toward feasible vocational objectives and his statements regarding his ability to procure employment on his own, future rehabilitation work with Mr. [redacted] would not be productive.

No future appointments regarding assistance with his return to work were scheduled.

It is our professional opinion that no further work with Mr. [redacted] is warranted.

Kay Chambers
Vocational Specialist

Nancy Witherly Jensen, M.S.
Certified Rehabilitation Counselor

KC;NWJ:ag

MAY 01 1981

August 7, 1981

William B. Taylor, Esq.
Taylor, Jones & Wilson
2725 Congress Street, Suite 2E
San Diego, California 92210

Dear Mr. Taylor:

In June,1981, you appeared before the Senate Labor Subcommittee and presented testimony in the Longshoremen's and Harbor Worker's Compensation Hearings. Enclosed with this letter you will find a set of questions based on issues raised by your testimony. Please answer these questions as thoroughly as possible and provide supporting materials as appropriate. If any aspect of a question is not addressed in your answer, explain the reason for this omission.

Your prompt response is appreciated, and in any event, your answers should be mailed no later than two weeks from the date of your receipt of this letter.

Sincerely,

Harrison A. Williams, Jr.

HAW/11
Encl.

COPY

FOLLOW-UP QUESTIONS TO: WILLIAM H. TAYLOR (REPRESENTING THE NATIONAL
STEEL AND SHIPBUILDING COMPANY)

1. With reference to your client's discharge of its obligation to injured employees under the LHWCA list the names of the private rehabilitation organizations that it utilizes.

2. State the number of referrals made by your client to the private rehabilitation listed above during each of the past three years.

3. State the number of referrals made or suggested by your firm during each of the past three years.

4. State the number of referrals made by your firm to the Department of Labor for the purpose of obtaining rehabilitation services during each of the past three years.

5. Is it the policy of your client to continue payment of temporary total disability benefits to claimants undergoing rehabilitation? If not, state the reasons for discontinuing payment.

6. It has been suggested that an increase in staff at the Department of Labor would improve the delivery of rehabilitation services. Do you concur with this view? State the reasons for your answer.

7. In your testimony before the Labor Subcommittee during the Longshoremen's and Harbor Workers' Compensation Hearings (June 1981), you asserted that workers on light duty have a "type of senior seniority" which "affects the morale of motivated injured and noninjured workers" and leads to a decline in productivity. Cite the statistics or figures which support this assertion

8. Continuing with reference to your criticism of light duty status, cite the productivity figures for each of the employers to whom you referred in your testimony as having reemployment programs. Cite such figures for each employer during each of the last five years.

9. State the number of injured workers on light duty or in related reemployment programs in Districts 13 and 18 as of this date.

10. In another section of your testimony before the Subcommittee, you proposed that an employer should be given a financial "break" if it provides a hearing aid to employees who have suffered a work-related hearing loss. Under the law, an employer is obligated to provide hearing aids in such situations. State your rationale for proposing this monetary incentive for employers.

11. In your view, if employers were not given a financial "break," would they refuse to provide adequate medical care for workers who incur a hearing loss? State the reasons for your answer.

12. Would you also propose that an employer should be given a monetary incentive to provide medical care for workers with normal vision who incur a work-related loss of vision? State the reasons for your answer.

13. Turning to another portion of your testimony, you asserted that significant numbers of claimants actively avoid post-injury work or perform work at a level below their capabilities. State the source of information which supports this assertion and the exact number of claimants that fall into this category.

14. Under current law, is there a provision for termination or reduction of benefits to workers who are not performing work at the level of their capabilities, without the necessity for a formal hearing on the question?

15. If an employer or carrier has previously terminated or reduced benefits based on employee failure to work up to his physical capacity, can benefits be restored, as developments warrant, without the necessity for a formal hearing?

16. On the basis of your knowledge and experience through dealing with LHWC Act cases, are you aware of so-called strains and sprains superimposed on degenerative or arthritic spines resulting in substantial or total disability, without evidence of disc rupture?

17. Have any bad faith law suits been filed by claimants against any employers or insurer you represent in the course of your practice under the LHWCA? If so, state the details of each suit as follows: caption or style of the case; name of the court in which the action was filed; allegations raised by the claimant in his pleadings.

18. Describe in detail efforts made by your client to improve safety conditions in the workplace.

TAYLOR, JONES & WILSON
ATTORNEYS AT LAW
2725 CONGRESS ST., SUITE 2E
SAN DIEGO, CALIFORNIA 92110
(714) 299-8600

WILLIAM H. TAYLOR
MICHAEL E. JONES
JOSEPH J. WILSON
RUSSELL K. LAMBEAU
ROBERT H. POTTER

4C

August 28, 1981

The Honorable Harrison A. Williams, Jr., Senator
United States Senate
Committee on Labor and Human Resources
Washington, D. C. 20510

Re: Questions concerning testimony before Senate Labor Subcommittee on Senate Bill 1182

Dear Senator Williams:

Thank you for your letter of August 7, 1981.

I am submitting to you, answers to the questions you have propounded predicated upon the experience of myself and my associates in this office and not on information provided by any of our clients. In our office we keep no figures in the areas on which you requested figures and the information I provide is based upon the estimates of me and my attorney associates.

With that preface, I attempt to answer your questions which are as follows:

Q1. With reference to your client's discharge of its obligation to injured employees under the LHWCA list the names of private rehabilitation organization that it utilizes.

A1. Regain, Crawford Rehabilitation Services, Inc., VRS and J. Fair & Associates.

Q2. State the number of referrals made by your client to the private rehabilitation listed above during each of the past three years.

A2. Information is not available.

Q3. State the number of referrals made or suggested by your firm during each of the past three years.

A3. (Estimated) 60, 70, 80 referrals made.

Q4. State the number of referrals made by your firm to the Department of Labor for the purpose of obtaining rehabilitation services during each of the past three years.

A4. None. Explanation: Experience with the Department of Labor rehabilitation personnel is that they do not aggressively pursue rehabilitation. Typically, the injured employee confronts the Department's rehabilitation advisor with a myriad of reasons why he or she cannot attend rehabilitation and the Department of Labor employee concludes that the injured employee's rehabilitation is "not feasible." Additionally, past experience has indicated to us that the rehabilitation personnel from the Department of Labor appear to take an advocate's position with respect to the injured employee's interests are concerned and refuses to provide the employer with their findings, recommendations, and when rehabilitation is indeed instituted, the progress or lack of progress of the employee. We have had to demand this information through the Deputy Commissioner's Office. In one case I was told by the rehabilitation person that it would harm the employee's compensation claim were rehabilitation information provided to the employer.

Q5. Is it the policy of your client to continue payment of temporary total disability benefits to claimants undergoing rehabilitation?

A5. Yes.

Q6. It has been suggested that an increase in staff at the Department of Labor would improve the delivery of rehabilitation services.

A6. I do not concur under the present state of the law. Claimants and their attorneys exhibit the pervasive view that rehabilitation will reduce permanent disability awards. It is fruitless to add staff to the Department of Labor in an attempt to get employees to retrain themselves when the employee is persuaded that retraining is contrary to his best interests.

Q7. In your testimony before the Labor Subcommittee during the Longshoremen's and Harbor Workers' Compensation Hearings (June, 1981), you asserted that workers on light duty have a "type of senior seniority" which "affects the morale of motivated injured and noninjured workers" and leads to a decline in productivity. Cite the statistics or figures which support this assertion.

A7. Neither my clients nor this office has any statistics or figures in support of this assertion. My information is gained through the interview of scores of fellow employees and supervisors of injured employees being asked to testify concerning an injured employee's post-injury work performance.

Q8. Continuing with reference to your criticism of light duty status, cite the productivity figures for each of the employers to whom you referred in your testimony as having reemployment programs. Cite such figures for each employer during each of the last five years.

A8. I do not have any such productivity figures.

Q9. State the number of injured workers on light duty or in related reemployment programs in Districts 13 and 18 as of this date.

A9. I do not have access to Department of Labor statistics. Indeed, I would anticipate that the Department of Labor has no way of determining whether or not an injured employee is on light duty or that it maintains any such statistic.

Q10. In another section of your testimony before the Subcommittee, you proposed that an employer should be given a financial "break" if it provides a hearing aid to employees who have suffered a work-related hearing loss. Under the law, an employer is obligated to provide hearing aids in such situations. State your rationale for proposing this monetary incentive for employers.

A10. One of the objectives of the program, according to my understanding of the intent of Congress, is that a program of workers' compensation be self-administered. It has been observed by persons much more erudite than I, that people tend to voluntarily do that which financially benefits them to do.

Q11. In your view, if employers were not given a financial "break," would they refuse to provide adequate medical care for workers who incur a hearing loss?

A11. No.

Q12. Would you propose that an employer should be given a monetary incentive to provide medical care for workers with normal vision who incur a work-related loss of vision?

A12. I am not sure that I understand the question. For purposes of answer I assume that this question relates to my recommendation that Congress resolve the difference of opinion which exists in the Court of Appeals as to whether permanent disability following eye injuries is to be determined based on uncorrected vision (without corrective lenses) or corrected vision (with corrected lenses).

It is indeed in the best interests of an employer to provide whatever treatment or device to an injured employee which will serve to reduce the employee's disability and the employer's liability for disability benefits. It is likewise in the employer's best interests to place an injured worker in a position where he is able to resume his usual and customary employment for such employer. An employer generally has a substantial investment in an employee in terms of training and experience. Assuming an employee suffers an injury to an eye resulting in partial loss of vision, no employer that I have ever represented or heard of would resist providing such employee with optimum corrective lenses or, on the other side of the coin, insist that an employee with impaired vision, work without optimally corrected vision. Indeed, I have never heard of such an individual attempting to work or perform functions of daily living suffering impairment of sight when such sight could be improved through the use of corrective lenses.

Nevertheless, it is the apparent position of the U. S. Department of Labor that people with impaired vision do just that: work without the use of their corrective lenses when corrective lenses improve their vision.

Most jurisdictions in this country recognize that fact of ordinary human experience and evaluate loss of corrected vision for purposes of workers' compensation compensation.

Q13. Turning to another portion of your testimony, you asserted that significant numbers of claimants actively avoid post-injury work or perform work at a level below their capabilities. State the source of information which supports this assertion and the exact number of claimants that fall into this category.

A13. The source of this information is my own experience in handling perhaps 1500 longshore claims over the past seven years; the similar experience of my associates in this office; experience shared with multiple other defense attorneys and workers' compensation administrators handling longshore claims.

I also have the advantage of 17 years of experience handling workers' compensation cases arising under the Labor Code of the state of California. Under the state system, a claimant with a back injury is primarily evaluated on medical evidence. His claim for permanent partial disability is not enhanced by the concept of partial loss of earnings. Thus, it does not help the state claimant's case to avoid or delay returning to work; to work at a lesser level of productivity and/or earnings nor to avoid retraining. The fact of the existence of the compensation claim rarely appears to be a factor with respect to the employee's return to work. Indeed, under the state system wherein employees are paid temporary disability during a period of retraining and cost of retraining underwritten by the employer, rehabilitation is a much sought after benefit. Under the longshore act the opposite is true: the employer virtually has to jam rehabilitation down the throat of the employee and rarely is able to get it down. The statistics of the Department of Labor in the 13th and 18th Compensation District, to which I referred in my appearance before the Labor Subcommittee, bear me out. Deputy Commissioner Cullen stated that in the combined 13th and 18th Compensation Districts in the year 1980, that the Department of Labor accomplished "10 to 20" rehabilitation programs this out of a volume of 11,000 open disability claims.

However, I have no way of stating the exact number of claimants who fall in this category. First of all, I do not maintain a statistical analysis of the cases we handle. Secondly, it is a pattern of conduct that is pervasive.

Q14. Under current law, is there a provision for termination or reduction of benefits to workers who are not performing work at the level of their capabilities, without the necessity for a formal hearing on the question?

A14. The Longshoremen's and Harbor Workers' Compensation Act does not pertain to termination or reduction of benefits to "workers who are not performing work at the level of their capabilities."

Accordingly, it is not an issue ever presented or which need be presented in a Department of Labor hearing under this Act.

I assume that if an employee is not performing work assigned, any employer has right to redress within the limits of its own agreement with that employee or his union.

Q15. If an employer or carrier has previously terminated or reduced benefits based on employee failure to work up to his physical capacity, can benefits be restored, as developments warrant, without the necessity for a formal hearing?

A15. The first assumption of the question does not arise in a workers' compensation case under the Longshore Act or any other worker's compensation system of which I am aware.

An employer can always voluntarily commence payment of benefits and indeed I am sure that 95% of all benefits provided are on a voluntary basis.

The cases in which we, as defense attorneys, are involved are a very small percentage of the total claims which arise, the balance consisting of claims in which all benefits have been provided voluntarily and over which there is not dispute. Indeed, I would estimate that in 75% of the cases we handle benefits have been provided voluntarily but dispute exists as to the extent of permanent disability.

Q16. On the basis of your knowledge and experience through dealing with LHWC Act cases, are you aware of so-called strains and sprains superimposed on degenerative or arthritic spines resulting in substantial or total disability, without evidence of disc rupture?

A16. I qualify my answer by assuming a definition of "substantial or total disability" in the question posed.

If that term is defined from a medical standpoint my answer is, none to my recollection.

If the definition of "substantial or total disability" is, the claim or representation of the claimant or a legal conclusion of an administrative law judge, then my answer is an unqualified yes many times over. The Benefits Review Board Service published by Matthew Bender contains hundreds of examples of such claims which have been taken through the appellate process. Goodness knows how many there have been under this Act.

Q17. Have any bad faith lawsuits been filed by claimants against employers or insurers you represent in the course of your practice under the LHWCA? If so, state the details of each suit as follows: caption or style of the case; name of the court in which the action was filed; allegations raised by the claimant in his pleadings.

A17. Our practice is limited to workers' compensation defense and we do not engage in any other type of practice. None of our clients have referred any such matter to us and thus we are not aware of any. It is my understanding that in California there is no case law precedent for a bad faith action by an employee against an employer or its insurance carrier arising out of a noncontractual workers' compensation obligation. Most compensation acts, including the Longshore Act, provide their own provisions to discourage arbitrary action on the part of an employer or insurance carrier (i.e. Section 914).

Q18. Describe in detail efforts made by your client to improve safety conditions in the workplace.

A18. Time and research permitting, I am sure I could provide a small volume in answer to this question. Every industrial client we have places substantial importance on safety. In this day and age it is well recognized in business circles that the unsafe workplace results in inefficiency, interruption in production schedules, increased workers' compensation costs and less profit. Safety is good business.

Finally, I am most pleased, Senator Williams, that you have expressed such in-depth personal interest in my comments on Senate Bill 1182. I hope my answers to your excellent and provocative questions will be of assistance in your committee's deliberation on this important legislation.

Very respectfully,

Taylor, Jones & Wilson

William H Taylor
By: William H. Taylor

WHT/cc

Senator NICKLES. Thank you.

Red Osborn, would you care to share with us a couple of minutes?

Senator Hawkins, we welcome you, and after this guest, we will welcome any comments you might have.

Mr. OSBORN. Senator, my name is Red Osborn. I am house counsel to Atlantic and gulf stevedores, in New Orleans. I am here today on behalf of the National Association of Manufacturers and the New Orleans Steamship Association.

I am a claims man. I am an attorney, but I really practice as a claims man, and I have for a number of years. So the part of the statement that I would like to recite to you here has to do with my practical experiences as a claims man, some of the frustrations that we face every day in the handling of claims under the act.

I appreciate the opportunity to be here. I know you hear from a lot of presidents of companies, and I am really grateful to be here as a claims man to let you know just what it is like in the trenches, with this act every day.

I have handled claims since 1962. I started as an insurance adjuster. I have lived through Sieracki, Ryan Indemnity and now through the post-1972 amendments age. And I can say most definitely, unequivocally, that the last is the worst. The post-1972 amendments have caused us tremendous problems. We thought the 1972 amendments would redistribute the funds and put them in the hands of the injured workman and not actually increase overall costs, but that has not proved to be the case at all.

I would like to talk about some of the more pertinent areas of the act that I personally have an interest in. Our frustrations can be divided evenly between the terms of the act and the administration of the act. The act itself presents very complicated and uneven and sometimes ambiguous statements and terms. The administration of the act further complicates it with more complex rules, regulations, decisions, and orders. So you really do not know where you are at any given time.

Your bill, I think, addresses most of these areas, and I think it is going to provide the necessary relief.

I want to talk about four specific problems in the act. The first is jurisdiction. In 1972, we saw the amendments as the final solution; that was going to get us out of Sieracki, Ryan Indemnity, get us back in the workmen's compensation business, and get the money to the injured longshoremen. You had to, we thought, be a longshoreman in order to be covered; you had to load and unload ships. I think that is my understanding of what the congressional intent was. So we viewed the amendments to the act very enthusiastically. We, as a matter of fact, submitted some memoranda in support of the act. Unfortunately, our enthusiasm was very shortlived.

Right after the act was passed, my first case involved a lift machine driver who was injured several months after the 1972 amendments were passed. I did not think there was any particular problem. When the claim was presented, obviously, the man was not a longshoreman; he did not load or unload ships. He was on a marine terminal, but it was a part of an Army base, and he was very far removed from the actual loading and unloading.

We tried the case; unfortunately, we lost the case. The line of decisions that have come since my case—and we do not try jurisdiction cases anymore, I might point out; I just do not feel that there is any percentage in trying—since my decision, you have had Caputo and Blundo, decided by the Supreme Court, with the container cases, and I have a case now that I have included in my statement that I think shows you just how far away from the original congressional intent that you can get. The case that is in the statement has to do with one of our gearmen. I am a stevedoring contractor. My office and gear yard and everything is near the Mississippi River in New Orleans. That is where it has to be. That is very much to my operational benefit. On the other hand, it is not to my benefit as a claims man, because anyone who is injured there unfortunately is covered. The act provides for coverage of people adjacent to. That has been interpreted to be next to, by the side of, and in my particular case, in the vicinity of. So we have gotten to the point now where practically, as the gentleman from Braswell said, any employee who works for our company is covered. So we just do not try jurisdiction cases, and I do not think that is what Congress intended initially, and certainly it is not what the stevedoring industry thought was intended.

The second problem that I have with the act as a claims man is choice of physician. I have been handling claims for a long time, and it seems to me the best way to handle the claims properly is to control the medical, to manage the medical. I do not mean controlling doctors and telling them what to do, but to have some say in how much medical is provided, who provides it, and at whose request it is provided. We have a situation in New Orleans where we do not have a panel of physicians, and injured claimants can shop doctors. Shopping doctors, of course, is like getting an estimate, and the plaintiffs will not tell you who they are seeing. And they have told me, in fact, "I am not going to tell you who I am seeing until I find out if he finds me disabled or not. If he finds me disabled, then I will tell you who he is." That is a situation that is just intolerable. You have no control at all over the medical in a case.

You have some proposed amendments to section 7 which address the medical management issue; I think that section is very good. It provides for a panel of physicians and something we really need. Presumption, section 20 of the act, that is a really bad problem. That has been in the act since 1927. It is not a 1972 amendment. But that thing has been interpreted to mean that anyone who presents a claim is covered. It is a presumption of coverage. And it is very difficult to present enough evidence to comply with the substantial evidence test that is included.

I have recited one case which illustrates the misuse that the presumptions can lead to. We have a case involving a low back sprain. On X-ray examination, we find a congenital defect, spondylolisthesis. I am sure the claims men behind me know what spondylolisthesis is. It is a very bad problem with back cases. But we had a man who, his own doctor found him returned to his pre-injury state and able to return to work. The man did not return to work. We went to an informal conference, and we presented that evidence, and the plaintiff did not present anything. He did not have any other doctors. He only had the one doctor that we sent him to. But his complaint was that his back hurt, and he could not work. Now, the presumption is called into effect in that kind of a situation. You not only presume coverage under the act, but you presume disability. And here, we have competent medical evidence that is not substantial to overcome a plaintiff's own, self-serving statement. That again is a situation that we face every day. It is not only in back cases. You face this in hernias and arthritis and any number of cases, but the presumptions are given to the plaintiff, and he does not need the presumption.

If anyone is truly injured, there is no problem in proving the case. It is very simple to prove the case. And there is no claims man who is going to fool with a good, meritorious case when he has got some others that he can spend more productive time on.

The last thing that I would like to speak on is settlements. The act does not really provide for a compromise; it provides for a settlement. Compromise, to my way of thinking, is parties not understanding just exactly the extent of their rights and obligations and not knowing how the case is going to come out, and compromising the case. The act does not say that. The act says settlements, and the Deputy Commissioner, of course, has interpreted settlements to mean something entirely different.

I do not think the Deputy Commissioners or the administrators of the act really understand what compromise and settlement is. Settlement, to their way of thinking, is something to insure lifetime benefits for a claimant. I have a couple of cases that I would like to illustrate. One involves this back case that I mentioned earlier, with a presumption of disability. After the Commissioner recommended the payment of compensation, quite naturally, the asking price for that case went up. We were originally talking about $25,000, and the asking price went up to $125,000.

Now, we ultimately resolved the case. The claimant's attorney and myself resolved the case. We went to the Deputy Commissioner's office to arrange for settlement. Now, you have to file a petition, and you have to support it with affidavits and trust in the State plans, and tell the Commissioner what the man is going to do with the money, and a lot of other material that—I hesitate to use the word—but in some cases, it may even be contrived. This man just wants to settle his case. I recognize the potential in the case, and I want to settle it, too, but we are in a kind of a "Catch-22" situation. If the man admits that he is going to take the money, go on vacation and go back to work, he is not going to get a settlement.

It is very difficult. The claims examiner in this particular case does not feel that settlements are appropriate at any time. It is an all-or-nothing proposition. If you settle a case, you have to provide for a man who is sitting there, telling the claims examiner that he cannot work. It is a difficult situation.

The case that we have, we called the claims examiner the other day, to try to talk him into settling this particular case. We are at $40,000. It is a good settlement. He did not feel too well that day. He said, "I don't want to talk about it today. Call me back tomorrow. I may feel better tomorrow." Now, that is not administration of the act. That is insanity. We have no relief from that. The Deputy Commissioner is the first level.

So if the act provided for compromises and it took away some of the emphasis that is placed on the Deputy Commissioner's finding that the settlement is in the best interest of the injured workman, then we could work out some of the cases. They would not go to long-term disability cases. And everyone, the injured workman and myself as well, would be happy.

One more case and I am going to close. This one involves a death. As you know, there is no provision in the present act to compromise death cases, 14(j) cases, which is the lump sum, present value discounted kind of a thing. That is awfully expensive, and of course, that assumes coverage under the act. It assumes causal relationship, jurisdiction, and all those other things.

I have a case that we tried to settle. It is a very unusual case. We had a supervisory employee who had a heart attack on a Saturday afternoon, very embarrassing circumstances. I will not tell you what happened in the case, but we had a claim made. I knew the widow, and I did not want to try this case. She fell in the clutches of some attorneys who perhaps were not as considerate of her as I thought I was being. We did not want to try the case. No way would I sit that woman on the stand and ask her the questions and produce the evidence that I would have to produce if we tried the case. We went to the Deputy Commissioner to compromise the case for a substantial sum of money. There is no provision in the act to do that. It is all or nothing.

Senator NICKLES. As the law now provides, death benefits or permanent total would be either all or nothing?

Mr. OSBORN. Settlements of death benefits are not provided for.

Senator NICKLES. Is it the same thing for permanent total?

Mr. OSBORN. No, you can compromise; 8(i) is disability. Section 8(i) allows the Deputy Commissioner to compromise settlements of disability cases when they are in the best interest of the plaintiff, which we talked about before. But the death business, there was no way that I was going to pay that widow a lump-sum discount, because I would have paid her $400,000 or $500,000.

Senator NICKLES. Let me ask you a question. Basically, I think you mentioned that the death was not work-related.

Mr. OSBORN. That is correct.

Senator NICKLES. Do you think that should be covered under the Longshoremen's Act?

Mr. OSBORN. Well, I am not sure that I understand your question. In this death case, the claim was made that there was a causal relationship. The man had worked earlier in the day, much earlier in the day, 5 or 6 hours before, but when he died, he was not working. He was not engaged in the pursuits of his employment.

Senator NICKLES. I want to get off that question. Let me ask you a different question. You mentioned four points, and very quickly, on the extended coverage, you mentioned that it now goes well beyond the actual water's edge.

Mr. OSBORN. That is correct.

Senator **Nickles**. I am assuming that you reviewed the legislation. We tried to tighten up that definition of how far we would go. Do you have any comments?

Mr. **Osborn**. It is written very well. It is drafted in such a fashion that it clearly defines the class of employees that are covered, loading and unloading ships. Of course, loading and unloading ships is subject to interpretation, but the amendments that you propose to the act go further to describe what longshoring is and what point of rest is, and things like that. So it very adequately addresses that question.

Senator **Nickles**. You also mentioned the fact—and it has been alluded to by almost every witness—that under present law, employees are able to shop for doctors and find the best one around.

Do you have any comments on the proposals that we put out as far as selection of physician?

Mr. **Osborn**. Now, the panel of physicians that is provided in the amendments is good. To my recollection—I do not have it with me—but I think the panel is drawn from physicians whose names are submitted by the carriers and the self-insured employers. The Commissioner will choose from those doctors several in certain locations. That is a good provision.

I think—I cannot recall the exact provision, but there is something in toward the end of that medical panel thing that I did not like, and I will send you a note on it. There was something about examinations by the Deputy Commissioner, or at the instance of the Deputy Commissioner, and it was not specifically said that the Commissioner had to choose physicians from the panel, which would lead you to believe that the claims examiner or the Deputy Commissioner could just take any physician, and I think we need to tighten that up a little bit to make sure that we do use panel physicians.

[The prepared statement and responses to subsequent questions by Senator Williams to Mr. Osborn follow:]

Testimony
on behalf of
The National Association of Manufacturers
and the
New Orleans Steamship Association
in support of S. 1182
Statutory Revisions of the Longshoremen's
and Harbor Workers Compensation Act
before the
Subcommittee on Labor
Labor and Human Resources Committee
U. S. Senate
June 16, 1981

Good morning Mr. Chairman, Members of the Subcommittee. My name is R. A. (Red) Osborn, Jr., Gulf Area Counsel for Atlantic and Gulf Stevedores, Inc. Accompanying me is Daniel W. Vannoy, Director, Product Liability and Employee Compensation Systems for NAM. I am appearing today on behalf of the National Association of Manufacturers and the New Orleans Steamship Association.

The NAM represents approximately 12,000 member companies, 80% of which are considered small busineses. NAM also has an affiliation with an additional 158,000 businesses through its Association Department and the National Industrial Council. Our membership employs 75% of all workers in the manufacturing sector and produces almost every conceivable product line.

The New Orleans Steamship Association represents 72 member companies which operate in the port area of New Orleans. Our membership includes all the stevedores in the area as well as the owners, operators and agents of vessels operating out of the ports of New Orleans and Baton Rouge.

The NAM and NOSSA are deeply concerned over the statutory defects incorporated into the Longshoremen's and Harbor Worker's Compensation Act (LHWCA) with the 1972 amendments. The provisions of the LHWCA directly affect all the members of the NOSSA as well as many other NAM companies and indirectly affect the concept of workers' compensation. The 1972 amendments have completely distorted the original purpose of the LHWCA -- to provide equitable compensation for work-related injuries to certain employees in maritime activities who constitutionally could not be covered under state workers' compensation programs. The NAM and NOSSA commend you, Mr. Chairman and Senator Nunn for introducing S. 1182 to address the problems of fairly and adequately compensating workers in maritime acitvities who are injured while on the job.

Before we address the specific abuses and problems of the LHWCA, allow me to speak of its overall impact on workers' compensation programs. The basic objective of any workers' compensation program must be to offset the loss of wages resulting from a work-related accident or illness and to provide adequate medical and rehabilitation services to the injured worker. The overriding concern is to rehabilitate and return injured workers to the job so that they may proceed through life in a constructive and meaningful manner. When this is not possible, an adequate layer of income protection should be provided in a fair and equitable manner. The NAM and NOSSA believe that the LHWCA provides disincentives to returning to work, invites fraud and abuse, is excessively costly, and fails to acheive the fair and appropriate balance so necessary to the successful operation of a workers' compensation program. The 1972 amendments have resulted in:

- o LHWCA jurisdiction being improperly extended inland to include workers already adequately covered under state programs.
- o the establishment of an unrealistic benefit structure. The program has moved inappropriately into life insurance, pension and other supplemental income provisions. Benefits, in many cases, are ordered to be paid even where employees continue to work at full wages and death benefits must be paid whether or not the death is job-related. The LHWCA benefit structure when compared to state workers compensation programs increase disparities in the treatment of injured workers by creating different benefit entitlements for workers with identical injuries/ disabilities.
- o costs becoming so exorbitant as to be unaffordable and in some cases virtually uninsurable.

The NAM and NOSSA supports S. 1182 as necessary and essential to correct the inequities created by the 1972 amendments.

I would now like to focus on the practical experiences and frustrations of a claimsman responsible for handling claims under the LHWCA. As a claimsman, I am grateful for this opportunity to share with this committee what the difficulties arising under the

LHWCA and its administration mean in the trenches. I first began handling claims under the Longshoremenn's Act as an insurance adjuster in 1962. My training for those claims was not a formal one. It was more of an "earn as you learn" experience but I it think has given me considerable insight into the ways and means we employ in dealing with claims under compensation statutes, both State and Federal. My education continued when I was employed by Atlantic & Gulf, first as claims manager and now as Gulf Area Counsel. I think I should mention at this point that A & G is a licensed self-insured under the Act and therefore I can speak for both employers who are insured and those who are self-insured.

I have lived and worked through the Sieracki, Ryan Indemnity and now the post '72 amendments and from a purely compensation standpoint can unequivocally say the latter is the most distressing. This is not so much from a financial standpoint, although the cost of workmen's compensation is shocking, but more from the inability to function as a claimsman should -- the fact that the opportunity to handle my claims as I have been trained has been taken away from me. I am no longer a claimsman, now I am a compensation administrator.

My frustrations with everyday practice under the Act can perhaps be evenly divided. First, the terms of the Act itself present complicated and uneven questions, many of which are also ambiguous. On the other side is the administration of the Act, which further complicates the situation with more complex, uneven and ambiguous regulations, decisions and orders. We are pleased to note that S. 1182 addresses many of these problems and in most cases provides the necessary relief.

JURISDICTION

The '72 amendments were initially enthusiastically viewed a as a viable solution to the problems created by Sieracki/Ryan. Originally the amendments were viewed as allowing employers to adequately compensate injured longshoremen, whether injured on the ship or on the pier, and avoid third party liability. This, it was felt, would put employers to square one -- adequately compensating injured longshoremen as contemplated by the 1927 Act. It was not felt that the '72 amendments would reduce overall costs. However, it was felt that we would once again be back in the compensation business placing the compensation dollar into the hands of the truly injured longshoremen. Unfortunately, such enthusiasm was short-lived.

The amendments became effective on November 28, 1972 and on March 27, 1973 a lift machine driver, employed by an Atlantic & Gulf, was injured. He was assigned by Atlantic & Gulf to work in a warehouse loading and unloading. He was working at the premises where Air Force Recruiting, Army vehicle processing, commissary and post exchange and other military activities were conducted. He was not a longshoremen, he did not load or unload ships. As a matter of fact he was not even employed on a pier or wharf. However, A & G did load and unload ships nearby.

A & G felt that the claim was without merit. Given that he was not a longshoremen, and did not load and unload ships, it was our opinion that he should not be covered under the LHWCA. Congress had not intended to create coverage for new classes of employees in enacting the 1972 amendments. The intent was to cover those longshoremen who passed in and out of coverage by reason of their being aboard a vessel or on the pier. We were wrong, as subsequently confirmed in the Caputo/Blundo and Diverson Ford cases decided by the U.S. Supreme Court.

As a footnote to this case, although it illustrates other difficulties with the Act, I would like to expand further on this case-in-point. The employee's injury was an orthopaedic one and he was awarded benefits on a non-scheduled loss of wage earning capacity. He also suffered a stroke and made claim for permanent and total disability. Had he been sucessful in that claim, benefits of 66 2/3 percent of wages, limited to the then maximum of $167.00 per week, would have been awarded. We were successful in defending the stroke claim but lost the war. The employee died from effects of the non-related stroke and his widow claimed the non-related death benefit provided for by the Act of 50-percent of wages -- not limited by any maximum. A & G believes these results are totally inconsistent with the intent of Congress.

As time passed and more experience under the '72 amendments was developed, the maritime industry found itself subject to a presumption of coverage for any employee injured at any location. A & G and other employers were and are experiencing claims for longshoremen injured well after working hours but while still in the parking area, longshoremen injured during altercations at the waterfront employment center and numerous container related cases.

A jurisdiction case which I feel to be the most obvious misinterpretation of Congressional intent involves that of one of our mechanics. He works at our main gear yard in the uptown section of New Orleans close to the Mississippi River. It seems logical to expect that a stevedoring contractor would want offices somewhere near the location of operations. This is efficient and good for operations. Unfortunately, this creates a tremendous impediment for the claimsman who wishes to show a lack of jurisdiction under the Act for a man injured there. The phrasing in the Act relating to "adjoining" becomes "adjacent to" then "next to" and then "close by" and finally "in the vicinity of" and he was covered. The irony of the this case is that another mechanic shop is located just across the street from our shop. The employees there do much the same work as done in the A & G facility and assume the same risks, but there is one difference -- the owners of that mechanic shop do not conduct stevedoring operations.

Incidentally, the claim cost for this injury under the Louisiana Workmen's Compensation law was $4,800 whereas the Federal Act yielded a $21,000 recovery. The NAM and NOSSA endorse the clairification of LHWCA jurisdiction as provided in S. 1182 to eliminate disparities in compensating injured workers similarly situated. If you load and unload ships, you are covered by the LHWCA. If not, state workers compensation programs apply. It is, or should be, that simple.

CHOICE OF PHYSICIAN

The second problem a claimsman faces in the adjustment of claims under the Act is that which is called medical management. The provisions of the existing statute have been largely disregarded in actual practice and medical management is presently a matter of luck. The injured employee has an unlimited choice of physicians, which may be exercised at any time, and as many times as he chooses. There is no medical panel of physicians in the New Orleans area. We have been advised by the Office of Worker's Compensation Programs that all licensed physicians are acceptable. This has led to the practice of "shopping" for doctors who have consistently been shown to be less than fair and impartial. I have quite often asked plaintiffs to tell me which doctor they were seeing and have been refused the information with the comment, "I want to see if he finds me disabled first."

Medical management permits the claimsman to monitor the treatment being rendered to the injured workman, to discuss his progress with the physician and to put him into a rehabilitation program as soon as possible. Claimsmen should have this right. After all, the employer is paying for these services. Without proper medical management, cases which should result in only short periods of disability in many cases turn into long term disability, and in some cases even permanent and total disability.

The cases that continually haunt me are those in which conflicting medical evidence is presented. I, on the one hand, present medical evidence alleging no disability and the plaintiff, quite naturally, presents evidence alleging disability. The controversy should be resolved by evaluating the competency of the physicians. However, under the LHWCA, the claims examiner relies on the old "catch-all presumption" and finds for the claimant. I have experienced this even where the weight and competency of the medical practitioners are not equal.

The proposed amendments to section 7 addresses the issue of medical management quite well. The NAM and NOSSA support these proposed amendments to restore some balance and control to the questions of sufficiency and competency of medical treatment.

PRESUMPTIONS

The single most misused provision of the Act for a claimsman to contend with is Section 20(a). Section 20(a) provides a presumption that the claim comes within the provisions of the Act. First of all, I do not see the need or appropriateness for any such presumption. If the employee is truly injured or disabled, he should have little difficulty in proving that.

It is true that section 20 also provides for a defense of "substantial evidence to the contrary." However, this is an area where administration of the Act fails miserably. For all practical purposes there is no defense, no evidence so substantial as to overcome the presumption of coverage. Another A & G case pending illustrates the extremes to which the misuse of presumption can be carried.

The plaintiff to which I refer was injured while on the job and was seen first by a general surgeon who referred him to an orthopaedic surgeon for treatment. The injury was diagnosed as low back strain with a two week estimated period of disability. X-ray examination revealed a congenital spinal condition of a type not caused by trauma. Some time later the orthopod released the plaintiff for work as having recovered from the effects of the injury. The plaintiff refused to return to work and engaged an attorney who requested an informal conference with the Department of Labor.

At the conference, medical reports were presented confirming recovery and return to work status. The plaintiff presented nothing -- no other medical, no other expert -- nothing. His only evidence was his statement that his back hurt and he could not work. With this evidence (or lack of evidence) the claims examiner recommended a resumption of compensation benefits and on a permanent and total basis. The basis for the recommendation was the presumption of coverage (disability) that arises when a plaintiff complains that he can not work. The medical reports in evidence were not substantial enough to overcome the presumption created by the plaintiff's own self-serving statement.

A claimsman faces this kind of situation almost every day. The circumstances vary, as do the disabilities claimed. I have had these kinds of cases involving hernias, arthritis, low back strains, heart attacks and even psychological claims. These presumptions are not only approved by claims examiners, but by the Judges and the Benefits Review Board as well. They create:

- o disincentives to return to work;
- o disincentives to seek rehabilitation;
- o situations which foster and invite fraudulent claims thereby turning relatively simple cases into horror stories.

NAM and NOSSA support the repeal of section 20 as proposed in S. 1182. Repeal of section 20 places the employer and employee on equal grounds and allows for a reasonable determination based on all the evidence submitted.

SETTLEMENTS

The last point I would like to mention, Mr. Chairman, which causes claimsmen many long and sleepless nights, is that of compromise and settlement. The problems a claimsman has with compromise and settlement under the Longshore Act are two-fold:

- the Act does not recognize a true compromise between parties;
- the administrators have not evidenced an understanding of compromise and settlement and the role it plays in our everyday society.

Settlements, not compromises, are provided for by section 8(i)(A) where the deputy commissioner feels such a settlement is in the best interests of the injured employee. This section does not provide, however, for a compromise of a claim where an employee may or may not be entitled to compensation or where the employee was killed and his survivors may or may not be entitled to death benefits. The section also places an undue emphasis on the deputy commissioner's role in determining whether the settlement is in the best interest of the plaintiff. I think that should be the job of the employee or his attorney and the claimsman. I resent having to produce evidence of job opportunities, trust and/or estate plans, affidavits, petitions and other assorted evidence demanded by the Deputy Commissioner to support a settlement when everyone knows the plaintiff is going to go right on back to work as soon as he gets his money. This is ridiculous!

In this regard, I would like to share with you two illustrations of the problem with compromises and settlements. The first illustrates the compromise of an injury case and the second involves a death.

The attempted compromise of the injury case attempt to compromise is a continuation of the low back sprain which I mentioned earlier. If you recall, it involves the presumptions applied to disability in the face of medical evidence. After the claim's examiner recommended the resumption of compensation, not surprisingly the asking price of the plaintiff's attorney went up, from $25,000 to $125,000. A & G recognized the potential liability of a case of this sort, so naturally, I began the process of negotiations with the plaintiff's attorney and ultimately arrived at a compromise figure of $40,000, which was acceptable to the plaintiff.

Now the fun begins. Here is a case A & G really should be paying nothing on. However, because of the unique presumptions given the plaintiff under the LHWCA, A & G must attempt to minimize the adverse effects by trying to spend $40,000. The application for approval of the settlement is filed, together with the affidavits required stating what the plaintiff will do with the money, that the plaintiff recognized this is a compromise settlement, and that neither he nor the employer wants to try the case because of the uncertain results.

Logic suggests this to be a good solution. Two parties agreeing in good faith to compromise. However, this case has not been approved by the Deputy Commissioner because the plaintiff has not returned to work -- the claim's examiner sees this as a fatal flaw in the settlement. According to the Deputy Commissioner, if the plaintiff has not returned to work, a settlement cannot possibly be in his best interest. A settlement is not in his best interest because he might win the case. It matters not that the plaintiff, being advised by legal counsel, does not wish to try the case or that he might lose the case and receive nothing.

The last word on this case was a recent telephone converstion with the claim's examiner in an effort to convince him to approve the settlement. We were told to call back tomorrow -- "I might feel better then." Such capricious and arbitary decision making is not administration, it is insanity!

I am going to close with a case which illustrates the need for a provision to permit the compromise settlement of death cases. The Act, of course, presently has no specific provision permitting such settlements, although it does not expressly prohibit them either. The Department of Labor has taken the position they are not allowed unless specifically permitted.

This case involved an employee who, because of pending circumstances, will remain nameless. The employee suffered a fatal myocardial infarction (heart attack) on a Saturday afternoon under somewhat embarrassing circumstances. The employee had worked some earlier in the day but at the time of death was not engaged in the pursuit of employment and was not on a marine facility. The surviving spouse retained an attorney to represent the estate and in the process a claim for compensation benefits was filed

A & G controverted the claim on what we felt to be rather obvious grounds -- no jurisdiction and no causal relationship. The plaintiff was able to get a physician to report the infarction to be job related rather than brought on by the activities the deceased was engaged in some five hours after completing any employment related activity.

This case presented questions which would prove extremely embarrassing to all parties concerned had they been asked in open court. Rather than do so, the parties agreed to a significant compromise settlement.

The Department of Labor was approached with the settlement only to find no available relief. With the Act and its administration it was all or nothing. Either we voluntarily paid death benefits or tried the case. This would not have been to anyone's advantage and was not the result that either the plaintiff or the employer desired. Fortunately, we were in a concurrent jurisdiction area and were able to compromise through the Louisiana law. However, we are still faced with a potentially viable federal claim.

The National Association of Manufacturers and the New Orleans Steamship Association respectfully request the Senate Labor and Human Resources Committee to favorably report out the legislative reforms to the Longshoremen's and Harbor Workers' Compensation Act as proposed in S. 1182 and to encourage the expeditious enactment thereof.

Thank you Mr. Chairman, members of the Subcommittee for this opportunity to share our views.

Atlantic & Gulf Stevedores, Inc.
STEVEDORES AND TERMINAL OPERATORS

601 LOUISIANA AVE. P. O. BOX 15119 (70175) NEW ORLEANS, LA. 70115
TELEX 58-352 CABLE: ATGUL (504) 899-9544

SENATOR
WILLIAMS N.J.
OCT -8 AM 9

October 5, 1981

Harrison A. Williams, Jr.
UNITED STATES SENATE
Committee on Labor and Human Resources
Washington, D. C. 20510

Re: S. 1182
U.S. Longshore & Harbor Workers' Act

Dear Senator Williams:

I am attaching responses to the questions you asked pertaining to my testimony on S. 1182.

I apologize for the delay in this response and hope you have not been inconvienced by same.

Your attention is appreciated.

Very truly yours,
ATLANTIC & GULF STEVEDORES, INC.

R. A. OSBORN, JR.
Legal Counsel

RAOjr/mmb
Enclosures

cc: Senator Don Nickles
Senator Orrin G. Hatch
Senator Robert T. Stafford
Senator J. Danforth Quayle
Senator Paula Hawkins
Senator Edward M. Kennedy
Senator Jennings Randolph
Senator Donald W. Riegle, Jr.
(all with encls.: interrogatories and responses)

ROUGH - ANSWERS TO INTERROGATORIES ON LONGSHOREMEN'S ACT
FROM R. A. OSBORN, JR. - Atlantic & Gulf Stevedores, Inc.

1.

I do not believe that any section of the Act gives an injured employee the right to excercise an unlimited choice of physicians, at anytime, and as many times as he chooses, however § 7(b) of the Act has been construed by some claim examiners to have such a meaning. § 7(e) also provides a choice of additional medical evaluation which is a provision easily abused by plaintiff's who find the first independent evaluation not to be supportive of their claim for disability.

2.

My testimony was presented as a report on the practical experiences of a claimsman and as such those remarks were more particularly reference to handling claims with claiments and to the administration of the Act by the Office of Workmen's Compensation Programs and not by the Benefit Review Board or judicial system.

3.

§ 7(e) of the Act does provide for protection for employers and carriers in the cases of unauthorized medical services, however it has not been my experience that the provisions of 7(d) which provide that protection have been ever invoked by the Department of Labor.

4.

This question cannot be answered by a simple yes or no. A claimsman must evaluate the exposure and potential of each case that he is presented with and each case must be considered on its own merits. I can see where circumstances might warrant a continuation of benefits if the injury is of such a nature to enable the claimsman to form an opinion regarding the continuation of disability and there are other cases where the same knowledge would justify termination of further benefits.

5.

This question is also a question that cannot be answered simply. Payment should not be made to physicians who are not identified or who refused to provide adequate reports on the nature and duration of treatment rendered however there can be cases where this could happen.

6.

Interrogatory No. 6 presupposes that the plaintiff is not complaining of pain in his daily routine which is more often the case we face. I would not provide voluntary reimbursement under those circumstances presented in this interrogatory, if the factual situation was so limited. Again, I must refer to the answer to Interrogatory No. 4 and point out that each case has to be considered on its own merits and considering the type of injury and the potential exposure to my company as a result.

7.

In cases where conflicting medical evidence is presented the employer has no choice other than to provide payments because in these situations the § 20 presumptions provide for a tiping of the balance in favor of the plaintiff.

8.

The fact that an informed conference is requested has no effect on my determination as to the payment of benefits.

9.

Recommendations of the claims examiner may or may not followed by employers and carriers. In such cases where in the opinion of the claimsman the claims examiner is incorrect in making his recommendations, the matter can be referred to the Administrative Law Judges and the Benefit Review Board for further clarification. In some cases the potential exposure to additional benefits might cause the employer or carrier to pay benefits recommended by a claims examiner when they feel the recommendation to be incorrect. This, again, is an Interrogatory which cannot be answered with a simple yes or no.

10.

The case you referred to in this Interrogatory is one where the plaintiff presented no medical authority or evidence and only alleged the continuation of pain and discomfort. The employer presented medical evidence indicating that no disability existed. The claims examiner recommended the resumption of benefits to the plaintiff. We did not resume periodic benefit payments however did engage in settlement of the case with the plaintiff and his attorney and the settlement was approved by the Deputy Commissioner under the provisions of § 8(i) of the Act.

11.

My opinion with respects to the offering of substantial evidence to rebut the presumption of § 20 was based on my own practical experience and not on any specific case law. It is our experience that practice before the Office of Workmen's Compensation Program and its claims examiners results in recommendations be issued in favor of the plaintiff's based on the presumptions contained in the Act even where the employer or carrier has offered substantial evidence to the contarary. The application of § 20 "Presumptions" calls for some exercise of reasonable judgement on the part of the examiner and in my opinion such reasonable judgement is not used.

12.

I am not aware of the position of the National Association of Manufacturers or the New Orleans Steamship Association with reference to competitive pricing the Workmen's Compensation market. I have no personal opinion regarding the availability or cost of compensation insurance through competitive pricing or calculated rate structure.

13.

Atlantic & Gulf Stevedores, Inc. has been a self-insured under the provisions of the Act since the early 1950's. I have no information regarding its experience prior to becoming a self-insured.

14.

The Louisiana compensation statute has been recently amended to upgrade the benefits and to provide annual increases. Shipyard workers and stevedores working in the state of Louisiana do live within this state and I see no reason for those classes of residents to be treated in a more preferred way than the other residents of the state of Louisiana.

15.

Maximum compensation rate for temporary total disability in Louisiana is presently $183.00 per week. I do not consider such a rate to be extremely low. In my opinion it is a benefit level which does provide adequate compensation benfits.

16.

I see no compelling reason for treating any class of workmen in Louisiana in a more preferred manner than provided by the state statute.

17.

The provision referred to in Interrogatory No. 17 is § 8(i)(3) of the proposed amendments to the Act. The provisions of § 8(i)(1) and 8(i)(2) are strongly supported by the National Association of Manufacturers and the New Orleans Steamship Association as well as by Atlantic & Gulf Stevedores, Inc.

17.(Continued)

We feel that these proposed revisions will clarify the position of the Deputy Commissioner with respects to the settlement of disability cases and will also permit the settlement of death cases. § 8(i)(2) will provide for a hearing before the Administrative Law Judge solely on the question of the suitability of the settlement. § 8(i)(3) however contains provisions which are not clearly understood and it is presented in such a fashion as to allow for a number of interpretations. We would suggest that the provisions of § 8 (i)(3) be redrafted to more clearly reflect the intention of those provisions and whether they apply to contested cases which have been the subject of a compromise settlement, or whether they apply only to those cases where the nature and duration of the disability has been agreed upon. I do not believe any compromise settlement should be restricted to a commutation schedule.

Senator **Nickles**. We do solicit your comments, and I will repeat that. And for the remaining panelists, I would very much appreciate your comments on specific recommendations, approval or disapproval of various parts of the legislation that we have before us, because we will be going into markup. I am hoping that we can go into markup before we recess in August. So we do have a lot of work.

I would also like to advise all panelists that we would request your cooperation—I have a note that Senator Kennedy would like to ask Mr. Braswell a couple of questions for the record, also myself, because we are under time constraints, and we do have many, many other panelists. We will have to keep moving, and we may not be able to give all the questions that we would like to or be able to even finish up on certain trains of thought.

If there is something that comes to light during this testimony, we will be keeping the record open, and if you would put it in a very short memo, concise and to the point, sections, et cetera, we will also enter those into the record with your advice or following cases or whatnot, where we can improve upon this piece of legislation.

Gentlemen, we thank you very much for your cooperation.

Before you leave, Senator Hawkins, do you have any comments for them, or would you like to make a general statement?

Senator **Hawkins**. Just a general statement. As you know, we are all on many committees and running from committee to committee, and I appreciate the time and trouble the witnesses have taken to come and bring this situation to our attention. Chairman Nickles is on top of the problems associated with the Longshoremen's Compensation Act and has made us all very well aware of it. I will follow these hearings closely, as we seek remedies for what has become a classic case of good intentions gone wrong.

The Longshoremen's Act is a textbook example, I feel, of misguided Federal action. While the goals of the act are entirely commendable, the actual result is impossible. No one can quarrel with the desire to provide low-cost, adequate coverage to dock workers. Certainly, when the bill was introduced in 1927, workmen's compensation programs were woefully inadequate or nonexistent in most of the harbors of the Nation.

Unfortunately, the correctives applied to the 1927 situation have now taken on a life of their own and threaten to choke off a vital area of this Nation's economy.

In Florida, we are particularly conscious of these choke points. Florida is an agricultural State. In particular, we export produce, which is a highly competitive industry, very sensitive to labor handling costs. Anything that elevates these handling costs artificially destroys our competitive position, costing us markets and jobs.

There can be no debate. The Longshoremen's Act raises these costs artificially.

Others today, I notice, will be discussing the specific problems with the current law, the tax-free benefits, so high that they discourage working; the death benefits, payable even though death is not work related; encouragement to organized crime that comes from the "sweetheart" doctor-client relationships; the extension of coverage far beyond the stevedores originally covered.

I am here to listen and to learn, and I plan to participate in the structuring of a compensation program free from some of these defects, one that better meets the needs of our work force and our industry.

I hope that during the discussion of reforming the Longshoremen's Act, we will have the opportunity to consider structuring a system that compensates based on degree of impairment and loss of earnings, instead of placing a dollar amount on the loss of a toe or a hand.

In 1979, Florida restructured its State workmen's compensation laws with a great deal of success, and I urge this committee to examine carefully and study what happened in Florida. We had a situation not quite as exaggerated, but very comparable, and we feel we have a handle on it.

I do not believe this issue should be seen, as I have noticed in some newspapers, as simply a labor-management argument. I do not believe that that is what it is. I know of no company—we have talked with company men and we have talked with labor union men—we do not know of any company that wants to subject its workers to unsafe conditions or wants to eliminate benefits. We want that word to go out. The companies want to help their workers. But competitive facts are facts. If something is not done to reduce the cost of a program that has gone to over $20,000 per person per year, there will be no compensation programs because there will be no jobs.

In Florida, just as in California, we are in competition with Mexico; in New York, the competitor is Canada. It does no good for organized labor to paint these suggested reforms as an attack on workers. Workers stand to gain more than anyone by a rational restructuring of this program. Without reform, they will be chasing their jobs to Canada or Mexico, and we will all be the losers. So we are looking for great cooperation with labor and management and the solution of this problem.

Senator NICKLES. Thank you, Senator Hawkins. We appreciate your support.

Gentlemen, we appreciate your attendance. I know many of you traveled a great distance and have put in a great deal of time, and we appreciate that and hope we will be able to address some of the problems that you have addressed today.

Thank you.

In our second panel today, we have William Huff III, vice president and general counsel of Employers Insurance of Texas; William Lachner, vice president, special risk facility, Insurance Co. of North America; and James Hughes, vice president of Midland Insurance Co.

Would the rest of you gentlemen identify yourselves, so I will know who you are, please?

Mr. LACHNER. William E. Lachner.

Mr. HUGHES. I am James F. Hughes, Midland, New York City.

Mr. HUFF. Mr. Chairman, with me today is Pat Whatley, who is an associate actuary with our company, and Roy Moore, who is the manager of our maritime claims.

Would you like me to start, Mr. Chairman?

Senator NICKLES. Yes, please. We might try to keep the noise down so we can hear our panelists. We would appreciate that also.

STATEMENT OF WILLIAM H. HUFF, III, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, EMPLOYERS INSURANCE OF TEXAS, ACCOMPANIED BY PAT WHATLEY, ASSOCIATE ACTUARY, AND ROY MOORE, MANAGER, MARITIME CLAIMS; WILLIAM LACHNER, VICE PRESIDENT, SPECIAL RISK FACILITY, INSURANCE CO. OF NORTH AMERICA; JAMES F. HUGHES, VICE PRESIDENT, MIDLAND INSURANCE CO., NEW YORK

Mr. HUFF I have just a brief oral statement, if I might, Mr. Chairman.

My name is William H. Huff, and I am senior vice president and general counsel for a group of companies including Texas Employers' Insurance Association, Employers Casualty Co., and Employers National Insurance Co.

With me today, as I have introduced them, are Roy Moore, manager of our maritime claims, and Pat Whatley, associate actuary. Mr. Whatley works with the ratemaking aspects of the act, and Mr. Moore has been involved in maritime claims for more years probably than he cares to admit.

You have mentioned earlier that the statement that I submitted would be made a part of the record; is that correct?

Senator NICKLES. Yes.

Mr. HUFF. TEIA is a mutual company which writes our longshore coverage in Texas. Employers Casualty Co. and Employers National write our longshore coverage out of Texas, which is limited right now to the gulf coast.

We have been writing longshore coverage in Texas since the passage of the act in 1927, and we have been writing since 1969 on the east gulf coast.

Our longshore premium volume in 1980 was approximately $47 million, of which $37 million was stevedore business, and the remainder, fixed platform offshore drilling or shipbuilding.

In my brief testimony today, I would like to discuss a few of the provisions of S. 1182, which address what we feel are major problem areas under the present law.

In previous testimony both in the House and the Senate, we have been asked what we consider the two most important areas for change, and we have consistently responded, first, unlimited escalation and second, jurisdiction. We, of course, could have added other sections, but those two have always stood out in our minds as areas which have created the most problems in setting reserves, establishing a fair but adequate price, availability and cost of reinsurance and to some extent, the maintenance of a viable market.

We have in earlier testimony in both the House and the Senate discussed at length the problems related to an unlimited escalation, both from our standpoint and our reinsurers. This major problem area affecting both availability and affordability is substantially reduced by putting a cap of 3 percent on the cost-of-living, tax-free escalation. To the extent that this improves our ability to accurately set a reserve, it follows that it also increases the accuracy of determining a proper rate to collect the correct amount of premium to mature these obligations.

The problem, of course, of which claim is going to cross the magic line and be subject to escalated benefits is not solved, but it is tempered, in our opinion, to a great extent and reduced to a more workable level.

To best illustrate the confusion which still exists with jurisdiction, one need only look at a recent case that we were involved with, *Texport Stevedore Co.* v. *Winchester*. We were involved on one side, and the Director of OWCP, on the other. It was a December 1980 decision by the Fifth Circuit Court of Appeals following an en banc rehearing. A gear room located five blocks outside the port area was held to be an "adjoining area" and thus met the situs requirement under the act. Eight judges dissented. Now, this was 8 years after 1972, when it was supposedly solved. The term "adjoining" was expanded to "to be near" or "to be close" or "neighboring." Coverage was extended five blocks, but the court specifically pointed out that it would not extend coverage in this case to downtown Houston. So somewhere between five blocks and downtown Houston is the outermost perimeter of the jurisdiction under this act.

In the dissenting opinion, it was pointed out that the court's interpretation of the act's situs requirement will lead to a case-by-case determination of claims and continuing litigation unless Congress acts to clarify who is covered.

We believe that S. 1182 addresses these jurisdictional uncertainties and defines in clear and concise language the activities that are subject to coverage under the act and appears to solve most of the jurisdictional problems we have encountered as an insurance carrier since the 1972 amendments.

Other areas of concern which we have raised in previous testimony which appear to be addressed by S. 1182 include: Negative incentive to return to work; unrelated death benefits; handling of medical; limit on fatal benefits; Benefits Review Board, and the coordination of various benefits programs.

In addition, S. 1182 attempts to address some of the developing problems with the special fund by creating the authority to create a committee to, in essence, oversee the second injury fund. The committee, if it is formed, with powers to defend the second injury fund, participate in settlements and other powers should make the use of the fund more difficult for collusive settlements, and by allowing the fund to participate in settlements, we should see a reduction in overall exposure for the fund.

I would encourage, as part of your oversight and review, a careful review of the entire special fund to ascertain if there is not a better way that some of these provisions might be handled. I think that the staff might look at how some of the States are addressing the problem of insolvent self-insureds, for example.

I also think it is important to ascertain whether or not the Department of Labor feels that they have sufficient power both as to requirements for approval of self-insureds and as to the termination of approval.

In addition, I would urge the committee to consider creating an advisory committee, such as proposed in H.R. 25.

I assume you can tell by the tenor of our testimony our enthusiasm for S. 1182. We wholeheartedly endorse this proposal.

Even if these amendments were adopted, the Longshoremen's and Harbor Workers' Act would still be a liberal workers' compensation act applied to an extremely hazardous occupation, with the danger of a large, catastrophic loss ever present. We feel that these proposed amendments will be of immeasurable help in handling claims, assuring greater confidence in setting reserves and pricing our product, obtaining reinsurance at a reasonable cost, and properly representing our customers.

On behalf of Mr. Moore and Mr. Whatley, I would thank you for your attention and would be glad to answer any questions that you might have.

[The prepared statement of Mr. Huff follows:]

STATEMENT OF
TEXAS EMPLOYERS' INSURANCE ASSOCIATION
EMPLOYERS CASUALTY COMPANY AND
EMPLOYERS NATIONAL INSURANCE COMPANY

BEFORE THE
LABOR SUBCOMMITTEE

OF THE
LABOR AND HUMAN RESOURCES COMMITTEE

OF THE
UNITED STATES SENATE

ON
S1182
AMENDMENTS TO THE LONGSHORE AND
HARBOR WORKERS' COMPENSATION ACT

JUNE 16, 1981

WILLIAM H. HUFF, III, SENIOR VICE PRESIDENT & GENERAL COUNSEL
ROY MOORE, MANAGER, MARITIME CLAIMS
PAT WHATLEY, ASSOCIATE ACTUARY

My name is William H. Huff. I am Senior Vice President and General Counsel for a group of companies including Texas Employers' Insurance Association, Employers Casualty Company and Employers National Insurance Company. With me today are Roy Moore, CPCU, who is the manager of our maritime claims division and is dealing on a daily basis with the claims and administrative aspects of the Act and Pat Whatley, an actuary with our companies who deals with the rating aspects of LSHWCA. While I will handle our brief oral presentation, I felt that these gentlemen could be extremely helpful in their areas of expertise in responding to questions that you may have which are not covered in our statement or not covered in sufficient depth in our formal presentation.

Perhaps a brief background about our companies would be helpful.

Texas Employers' Insurance Association, which is licensed to do business only in Texas, is a mutual type company which was created by statute in 1913 by the Texas legislature at the same time that the first compensation act was passed in Texas. At that time there were few, if any, companies writing workers' compensation and none in Texas. The purpose and philosophy of Texas Employers' Insurance Association was and is to write workers' compensation coverage at cost, a philosophy we have maintained to this day. As a mutual company it is owned by its policyholders and we pay back in either dividends or discounts any underwriting profit we earn keeping only the investment income to build surplus. In fact, our losses, expenses, dividends, and discounts have exceeded our premiums earned during the 67 year period of our existence. Texas Employers' writes most of the Stevedore business in Texas.

Employers Casualty Company is a stock insurance company organized under the laws of Texas which is publicly held and traded on the National Over-the-Counter market. Employers National Insurance Company is a stock insurance company organized under the laws of the State of Delaware and is owned jointly by Texas Employers' Insurance Association and Employers Casualty Company. Employers Casualty Company and Employers National Insurance Company write our Stevedore business outside of Texas.

Our companies are very active in the writing of Longshore and Harbor Workers' Coverage for stevedores and we write a substantial portion of the Stevedore coverage written on the Texas, Louisiana and Alabama Gulf Coast. We have written some business in other jurisdictions but only as an accommodation to our Gulf based stevedores. The only reason, initially, that we wrote any stevedore business outside of Texas was to accommodate our Texas based stevedores.

We wrote approximately 47 million in Longshore premium last year which would make us one of the largest writers of this coverage. We have been writing longshore and harbor workers' coverages since 1927 in Texas and since 1969 in Louisiana.

We have invested much manpower, time and money in the fields of safety and rehabilitation of Longshoremen. For example, the Engineering Department of our companies offer a variety of accident prevention services designed to assist each stevedoring company in maintaining, improving and installing an accident prevention program tailored to fit operational needs. To accomplish this, graduate engineers who have been trained and are familiar with stevedoring operations are strategically located along the Gulf Coast.

Sufficient managment surveys, ship surveys and surveys of dock operations are made by these engineers to determine hazardous environmental conditions and to make recommendations for elimination and reduction of these hazards based on accepted engineering standards. Consultative service is offered to management regarding the planning and conducting of accident prevention activities.

A staff of specialized Industrial Hygiene and Health Specialists assist stevedores in determining hazardous conditions which might endanger their workers' health or lead to occupational disease. Permanent and mobile laboratories are equipped to test for chemical hazards, fire and explosive hazards, airborne contaminants, noise, radiation and other health exposures.

The Department's Communication Section develops technical, educational and other safety material needed to support our consultative and training services. Professionals skilled in technical writing, illustration, training, library science and photography combine their talents in creating and producing such items as:

1. Survey Guide Sheets for Longshoring Operations
2. Investigation of Accident Guide
3. Stevedoring Supervisor's Course in Accident Prevention
4. Longshore Accident Analysis
5. Film Presentations
6. Stevedore Safety Data Sheets
7. Flyers (handout material) on Longshore Safety
8. Stevedoring Safety Posters
9. Accident frequency studies by Port and by each individual Stevedore.

Employers Insurance of Texas engineers work closely with the Maritime Association, Port Authorities, Port Safety Councils, State Safety Councils, National Safety Council and other groups and organizations to assist in industry-wide accident prevention efforts.

We have a separate rehabilitation unit which includes a staff of registered nurses working with the treating physician and our medical advisors which has developed a nationwide reputation of excellence.

We encourage rehabilitation referral by the claims representative as soon as they know of the injury. Most referrals are: 1. all spinal cord injuries, 2. head injuries with residual deficit, 3. burns--20% body surface with second and third degree depth, 4. all electrical burns, 5. all upper and lower extremity amputees, 6. brachial plexus injuries with paralysis or weakness, 7. multiple injuries with expected long convalescence.

Other considerations for referral on less severe injuries are pre-existing physical or social complications.

The function of the rehabilitation nurse after assignment is to be the liaison and coordinator for all people involved. These include doctors, paramedical professionals, claims representatives, employer, the patient and family, community agencies, attorneys, attendants and vocational agencies.

Our primary goal is to return the claimant to employment in minimum time with the least disability, at a minimum cost by obtaining the best medical care available. This is done by, 1. keeping cognizant and maintaining rapport with special facilities such as burn units and rehabilitation centers, 2. incorporating the use of our medical advisors when applicable, 3. keeping up-to-date on new medical-rehabilitation techniques.

If employment and/or self-care cannot be obtained, prevention of complications and deterioration become primary goals through proper medical follow-up, health teaching, counseling and home modifications.

We have 17 medical advisors in Texas, Oklahoma, and Louisiana who assist us by reviewing medical reports and bills, communicating with treating doctors concerning patient condition, and assisting us in severe injury cases to determine extent of injuries and the possibility and advisability of a rehabilitation/burn/special center referral.

We have medical advisors along the Gulf Coast at New Orleans, Beaumont, Galveston, Houston, Corpus Christi, and Harlingen.

What this points out is that, to us, LSHWCA coverage is big business, we have been in it an awfully long time and our actions, I think, indicate our desire to stay in this business. While we are continuing to write longshore and harbor workers' coverage for our present stevedore policyholders, we are closely watching our results. When or if we determine that continuing to provide coverage is detrimental to all other policyholders for any reason, then we will withdraw from this market.

Prior to the House oversight hearings we had not been active in hearings relating to benefits under LSHWCA since we have felt that those discussions should be between those who pay for benefits and those who receive benefits and that as long as we could price the product with some degree of confidence we would write it.

Under the Texas Insurance Rating Law, the ratemaking authority lies with the Texas State Board of Insurance. While in most other jurisdictions, the State authority will approve or disapprove a workers' compensation filing made by the National Council on Compensation Insurance or other statistical agency, in Texas, the State Board of Insurance not only promulgates WC rates but also has the responsibility to compile the statistical data used as a basis for determining the rate. The State Board has a competent actuarial staff who then computes the rate based on the compiled statistical data which the Board will approve or disapprove after a public hearing is held. A copy of the calculation of manual rate level for the stevedoring classes prepared by the staff of the Texas State Board is attached as exhibit 1.

Page 2 of this exhibit shows a rate history since 1959 for the classification codes involved. Please note the substantial increase effective December 11, 1972 from $24.10 to $38.37 which was due to the increased benefits effective November 26, 1972. It is also noteworthy that each year since, rates have been adjusted, sometimes upwards - sometimes downwards to its present gross level of $50.70.

Page 3 of the exhibit shows the actual derivation of the change in Manual rate level. This page clearly shows that the rates are based on the actual premium and loss experience of the stevedores. The premiums and losses (including claim reserves) are reported to the State Board by the carriers. Thus, the key to an adequate rate depends on the ability of the carrier to establish an accurate reserve in a relatively short period after a claim is reported.

When we talk about claims reserves, we are talking about the amount of money set aside or earmarked to pay losses. The aggregate claims reserve of a carrier or a self-insured as of a certain date is in theory the amount which would liquidate all unsettled claims up to and including that date. This includes claims that are reported and known and those claims that have occurred but have not yet been reported. Workers' compensation claims are historically difficult to evaluate and properly reserve because they are developmental in nature and one, two, three or more years are required for an adjudication or determination to be made regarding the extent of injury. Longshoremen's and Harbor Workers' Act claims are among the most difficult of all claims to properly reserve because of the influence of many variables particularly on permanent total disability and fatal cases. These variables are as follows:

1. escalation (discussed later)
2. rate of return on investments - funds set aside for an extended period of time for future loss payments will earn interest and are reflected in the reserve.
3. mortality of survivors in fatal cases as well as the claimant who is totally disabled.
4. in the case of a surviving widow the probability of remarriage is a consideration.

While contingencies (2), (3) and (4) are important and not 100% predictable they do not affect future benefits, only the amount of reserves that a carrier must establish. Therefore, escalation is the single most important variable in the value of the claim because of its unknown quantity. Since escalation does affect future benefits, it is one of the major concerns of insurers and reinsurers alike. While remarriage will affect future cost there are those who believe that there should be no remarriage factor in the calculation of a reserve since, with such liberal benefits, very few seem to ever remarry.

Since losses (paid and reserved) are necessarily related to premium received for a given period of time such as a policy year or calendar year, the establishing of an accurate reserve soon after a claim is reported is essential in spite of the many variables. The insurers must fund and have reserves for losses in the year the accidents or injuries occur. While a legislature can appropriate money from general reserves to pay a bill in the year it is due, an insurer does not have the same luxury. They must set aside the present value of a claim to insure that the money will be available to pay the loss over the years. It is a position of trust and fiduciary responsibility to our insured and to the injured claimant.

If we find ourselves substantially under reserved over a period of years the results could be catastrophic because rates are based, to a great extent, on losses trended to date. The experience of the past dictates what the price should be at the present time to provide funds to pay for losses in the future. If reserves are not carefully and frequently scrutinized, it could result in an extreme jump in rates in one year or could eventually lead to insolvency especially with the extremely high benefits available under the Longshore and Harbor Worker's Act. The problem has been particularly difficult since the 1972 Amendments because of the many uncertainties and unknown features in the Act such as the jurisdictional disputes not yet fully resolved, the practical elimination of the Statute of Limitations, the "long tail" on many of the claims, the high benefits that have created negative incentive to return to work in many instances, and last but not least, the indexing or escalating feature of total permanent injuries and death claims.

With that background in mind we would like to address certain aspects of S 1182. We will comment on certain aspects which we feel address almost all of the concerns and problems which we have raised concerning the 1972 amendments, together with some suggestions as to some additions or changes which the committee might consider.

1. Indexing or Escalation: In earlier testimony before both House and Senate Subcommittees we discussed at length the problems related to an unlimited escalation both from our standpoint and our reinsurors. This major problem area affecting both the availability and affordability of the Longshore and Harbor Workers' Act coverage is substantially reduced by putting a cap of 3% on the cost of living, tax free escalator. This will enable us to replace what is at most an informed guess with a statistical projection which will have a reasonable degree of certainty. To the extent that this improves the ability to accurately set a reserve, it follows that it also increases the accuracy of determining a proper rate to collect the correct amount of premium to mature these obligations.

The problem of which claim is going to cross the magic line and be subject to the escalated benefit is not solved but it is tempered to a great extent and the odds are reduced to a more acceptable and workable level.

2. Negative Incentive to Return to Work: This Bill addresses this problem as well as it can be addressed, by both changing the method of determining average weekly wage from 66 2/3 of gross income to 80% of spendable income as recommended by the National Commission on Compensation Insurance and also by providing for the offset of benefits in both Disability and Death cases by the receipt of other benefits such as social security, pensions, unemployment compensation, etc. This also addresses the problem which has arisen under the current law of using the LSHWCA as a supplement to other retirement benefits.

3. Unrelated Death Benefits: This proposal eliminates the unrelated death benefit provision which had, in our opinion, no place in the compensation system. It is a fringe benefit that should be addressed in collective bargaining and not by legislation.

4. Reinsurance: In the ensuing years since 1972, a complex reinsurance problem has evolved. It has become increasingly difficult for an insurer to obtain reinsurance against a catastrophic event. Certainly old reinsurance concepts, procedures, methods, and coverage have gradually changed. As I understand it most insurers have had to re-evaluate their reinsurance programs and in most cases, make substantive changes. Reinsurance is vital to the economic well being of any Casualty Insurance Company. Certainly inflation in general, especially as it affects medical costs, high weekly benefits, and escalation of benefits have made their contribution to the reinsurance problem.

While I believe it would be better if you had a representative of the reinsurance business to comment on the reasons for the changes in the reinsurance market, I can relate to you the changes in our program within the last few years and speculate as to the reasons why.

Prior to 1976 our reinsurance program was very simple in that we collected from the reinsurer when the actual paid loss exceeded a predetermined retention. This retention applied regardless of the number of claims in the accident. Thus as an insurer we knew exactly what our ultimate liability would be.

Our current reinsurance program also has a pre-determined retention amount for each accident. However, a notable difference is that we now recover our loss based on the commuted or present value of the claim five years after the date of the accident. Our recovery from the reinsurer is dependent on future escalation, the remarriage contingency, mortality contingency, and the assumed rate of return on investments. Thus, it is evident that the correctness of these assumptions will have a direct bearing on whether or not we are adequately reinsured. We think we have an adequate reinsurance program and that our reserve assumptions are correct. However, to the extent we err in our assumptions on escalation, for example, we will bear the cost alone and not the reinsurer. If for any reason we could not obtain reinsurance we could no longer write longshore coverage.

Our reinsurance program is not unique and is, in my opinion, better than many reinsurance programs being offered by reinsurers dealing with the problem of indexing. Some reinsurers simply exclude escalation; some have an index clause in which the companies' retention increases each year by some pre-determined formula and others have an adjusted dollar clause in which the reinsurance liability is adjusted to the dollar value at the date of injury.

By whatever method chosen, however, it all points to the same problem. Reinsurers are not willing to assume the uncertain and speculative exposure of an unlimited escalation of benefits. If the indexing feature were capped at a certain percentage, such as in S 1182, it is my opinion that the reinsurers would be able to both offer and price the product with a better degree of certainty.

Capping the escalation at a certain percentage does not eliminate the need for reinsurance or all of the uncertainty associated with it. Reinsurers still have to contend with the possibility of a catastrophic loss, such as an explosion. Two, three, or more multiple claimants from a single occurrence can generate a sizable cost, particularly with unlimited medical benefits. It must be remembered that stevedoring, offshore drilling, etc., are relatively hazardous occupations and the possibility of catastrophes of this type are very real. The cap on escalation would, however, bring the problems of reinsurance under the LSHWCA more in line with the problems associated with Workers' Compensation in general which generally relate to inflation.

5. Handling of Medical: This bill requires the appointment of a panel of physicians nominated by employers and selected by the Deputy Commissioner to treat injured workers in each community. We believe that this will better assure the quality of care of injured workers than the present method of allowing free choice of any practicioner, whether qualified or not.

6. Fatal Benefits: This proposal corrects what was probably an oversight and applies the maximum compensation rate to fatal benefits.

7. Jurisdiction: Jurisdictional uncertainty resulting from the extent of coverage ashore in the 1972 amendments is one of the major problem areas of the present Act. "Maritime employment" and "adjoining area" are undefined terms vital to a determination of coverage and it was left to the administrators and adjudicators to interpret these terms. Millions of dollars have been spent on litigation groping for judicial interpretation of these terms and the resulting guidelines for determining who is and who is not covered under the LSHWCA. The jurisdictional problem in our opinion was and continues to be the most litigated area of the Act. There are those who would tell you the jurisdictional problems are now resolved, and certainly in some areas there has been some clarification over the years, but the continuing problem can be illustrated by a December 10, 1980, decision by the Fifth Circuit Court of Appeals following an en banc rehearing. A gear room located five blocks outside the port area was held to be an "adjoining area" and thus met the situs requirement for coverage under the Act. Eight judges dissented from the decision indicating that even after eight years the vagueness of the Act is causing trouble in reaching a consensus as to where the jurisdiction of the Act ends. The term "adjoining", in addition to its usual ordinary meaning, was expanded to "to be near" or "to be close to" or "neighboring", terms even more undefined and imprecise in meaning. Coverage was extended five blocks but the court specifically pointed out that it would not extend coverage in this case to downtown Houston. This suggests that somewhere at some unknown location between those two points coverage ceases. As pointed out in the dissenting opinion, the courts' interpretation of the Act's situs requirement will lead to a case by case determination of claims and continuing litigation unless Congress acts to clarify who is covered.

It is not our concern as an insurance company specifically who is and who is not covered under the Act. That should be determined by those receiving benefits and by those paying for the coverage. It is important to us however, that the parameters of coverage be reasonably well defined so that the coverage can be provided when necessary and appropriate rates determined. Senate Bill 1182 appears to solve the jurisdictional uncertainties, the undefined terms such as "Maritime employment" are replaced with specific definitions and the Act defines, in clear and concise language, the activities that are subject to coverage under the Act. Additionally, it specifically elicits those employments which are not intended to be covered. This bill appears to solve most of the jurisdictional problems we have encountered as an insurance carrier since the 1972 amendments.

8.a. Special Fund - Section 8(f): We have previously pointed out in testimony before both the House and the Senate our concern with the Special Fund and the fact that it is becoming an albatross around the necks of employers who are insured and of employers who are self-insured. The payout for Second Injury Fund cases has gone from slightly over $100,000 in 1976 to $5,687,900 in 1980. Indications are that payments from the Second Injury Fund are running around $900,000 to $1,000,000 per month in 1981.

b. Special Fund - Section 18(b): Of equal concern to us is the fact that under the present law, where a judgment cannot be satisfied by reason of the employer's insolvency or other circumstances precluding payment the Secretary of Labor may make payment out of the Special Fund. This means that those employers who are providing coverage through insurance and those employers who have adequately secured their exposure in another manner will end up paying for the losses of the employer who did not adequately provide for the protection of his potential loss.

I believe that this proposed legislation makes a start towards improving the Second Injury Fund portion of the Special Fund by allowing the creation of a "fund representative" and to allow that "fund representative" to "defend the fund", participate in settlements and other powers which will make more difficult the use of the fund as a collusive dumping ground for Longshore cases.

I would respectfully suggest, however, that the special fund be very carefully reviewed to assure that the provisions are fair; that there is no better way to handle the problem; and that if not, that the Department of Labor has the type of rules and regulations relating to self insurance to more reasonably insure that they will be able to pay losses when due.

9. Other Comments: We are uncertain as to what our response might be to other features contained in this Act. For example, we are undecided as to what our position should be on the use of the substantive OD laws of the various states to determine compensation under the LSHWCA. This may lead to forum shopping at least by those who regularly worked in more than one state or those whose workplace is equidistant between two states such as a river or bay.

We would strongly urge you to consider a provision creating an advisory committee on Longshoremen's and Harbor Workers' Compensation such as is contained in H.R. 25. This was one of the recommendations of the National Commission on Compensation Insurance. A committee such as this would be valuable in reviewing how the Act is working and recommending changes which need to be made.

Conclusion

As I stated earlier I feel that an insurer's proper role in any discussion of changes in a compensation act is to point out problems that we are having with the current act and to comment on whether proposed solutions will or will not address the problems which have arisen. It is not our role, in my opinion, to tell this committee what should or should not be in this Act.

With the above in mind I can state to you that this proposed legislation addresses almost all of the problems and concerns which we have expressed in this and previous testimony. We wholeheartedly endorse this proposal.

This should make the providing of coverage under this Act a more easily predictable event. You should keep in mind, however, that even with these amendments the LSHWCA is still a liberal WC act. In addition, stevedoring is an extremely hazardous occupation with the danger of a large catastrophic loss ever present.

As a result, I cannot tell you that passage of these amendments will solve all of the availability or affordability problems which may exist at the present time. There was not a multitude of companies writing WC under the law as it existed before the 1972 amendments. It is a highly specialized field which takes expertise derived over a long period of time.

Certainly for those of us in the market and for those who would have been willing to write this coverage but for the uncertainties in the Act, passage of these amendments will be of immeasurable help in handling claims, assuring greater confidence in setting reserves and pricing our product, obtaining reinsurance at a reasonable cost and properly representing our customers.

On behalf of Roy Moore, Pat Whatley and myself, I thank you for your courtesy and kind attention. If we can respond to any questions or provide more information, we would be most happy to do so.

TEXAS

WORKERS' COMPENSATION INSURANCE

STEVEDORING CLASS CODES

7309F, 7313F, 7317F, 7323F,
7327F, 7350F, 8709F, 8726F

RATE AND STATISTICAL EXHIBITS

1980

PREPARED BY

PROPERTY AND CASUALTY

ACTUARIAL DIVISION

TEXAS STATE BOARD OF INSURANCE

WILLIAM P. DAVES, Jr.
Chairman

DURWOOD MANFORD
Member

LYNDON OLSON, Jr.
Member

E.J. VOORHIS
Commissioner Of Insurance

TEXAS WORKERS' COMPENSATION INSURANCE
RATE REVISION EFFECTIVE OCTOBER 1, 1980

EXPENSE PROVISIONS FOR STEVEDORING CLASS CODES*

1. Total Production Expenses	17.50%
2. General Expenses	8.76
3. State Texas, Licenses & Fees	4.93
4. Potential Underwriting Profit	2.50
5. Total (Rounded)	33.7 %
6. Loss and Loss Adjustment Expenses	66.3 %

Notes:

(A) Texas taxes consist of the following:

Gross Premium Tax (Maximum Rate)	3.85%
Industrial Accident Board	+ 0.45%
Department Maintenance	+ 0.13%
Miscellaneous	+ 0.50%
	4.93%

(B) Loss Adjustment Expense:

A factor of 1.115 is used to adjust incurred losses to include all loss adjustment expenses.
Pure incurred loss ratio: (66.3 + 1.115 = 59.5%)

*Applicable to the first $1,000 of Standard Premium.

RATE HISTORY OF TEXAS STEVEDORING CLASSES
7309F, 7313F, 7317F
OCTOBER 1, 1960 / 1979

Effective Date	Manual Rate	% Change	Effective Date	Manual Rate	% Change
CODE 7309F STEVEDORING N.O.C.					
October 1, 1960	$20.20	--	October 1, 1970	$21.28	- 0.8%
October 1, 1961	22.21	+10.0%	April 1, 1972	23.93	+12.5
October 1, 1962	20.26	- 8.8	October 1, 1972	24.10	+ 0.7
October 1, 1963	20.45	+ 0.9	December 11, 1972*	38.37	+59.2
October 1, 1964	17.91	-12.4	October 7, 1973	39.05	+ 1.8
October 1, 1965	18.43	+ 2.9	October 1, 1974	35.25	- 9.7
October 1, 1966	16.92	- 8.2	October 1, 1975	28.95	-17.9
October 1, 1967	18.67	+10.3	October 1, 1976	36.16	+25.0
October 1, 1968	20.51	+ 9.9	October 1, 1977	41.61	--
May 17, 1969*	21.08	+ 2.8	October 1, 1978	48.71	+17.1
October 1, 1969	21.46	+ 1.8	October 1, 1979	51.69	+ 6.1
CODE 7313F STEVEDORING - DOCK OPERATING - MECHANICAL					
October 1, 1960	$ 7.03	--	October 1, 1970	$ 5.31	+ 2.3%
October 1, 1961	6.62	- 5.8%	April 1, 1972	5.56	+ 4.7
October 1, 1962	6.23	- 5.9	October 1, 1972	5.82	+ 4.7
October 1, 1963	6.74	+ 8.2	December 11, 1972*	12.13	+108.4
October 1, 1964	5.84	-13.4	October 7, 1973	14.73	+21.4
October 1, 1965	4.73	-19.0	October 1, 1974	13.61	- 7.6
October 1, 1966	3.82	-19.2	October 1, 1975	11.18	-17.9
October 1, 1967	4.04	+ 5.8	October 1, 1976	12.63	+13.0
October 1, 1968	4.37	+ 8.2	October 1, 1977	13.56	--
May 17, 1969*	4.67	+ 6.9	October 1, 1978	13.42	- 1.0
October 1, 1969	5.19	+11.2	October 1, 1979	12.41	- 7.5
CODE 7317F STEVEDORING - HAND OR HAND TRUCKS					
October 1, 1960	$ 5.22	--	October 1, 1970	$ 3.85	- 9.8%
October 1, 1961	4.58	-12.3%	April 1, 1972	4.06	+ 5.5
October 1, 1962	3.72	-18.8	October 1, 1972	4.46	+ 9.9
October 1, 1963	3.83	+ 3.0	December 11, 1972*	7.79	+74.7
October 1, 1964	3.69	- 3.7	October 7, 1973	8.88	+14.0
October 1, 1965	3.37	- 8.7	October 1, 1974	10.55	+18.8
October 1, 1966	2.88	-14.5	October 1, 1975	10.55	N.C.
October 1, 1967	3.55	+23.3	October 1, 1976	10.55	N.C.
October 1, 1968	3.97	+11.9	October 1, 1977	10.02	---
May 17, 1969*	4.17	+ 5.0	October 1, 1978	11.81	+17.9
October 1, 1969	4.27	+ 2.4	October 1, 1979	13.45	+13.9

October 1, 1977 rates and later are based on $300 Payroll Limitation Rule; rates shown for prior years are based on $200 Payroll Limitation Rule.

*Law Amendment Change

TEXAS WORKERS' COMPENSATION

RATE DEVELOPMENT OCTOBER 1, 1980

STEVEDORING CLASSES

The development of the indicated change in rate level for the Stevedoring Classes (7309F, 7313F, 7317F, 7323F, 7327F, 7350F, 8709F, 8726F) set out below, is determined from the experience of these classifications for the 1977 and 1978 policy years weighted with the latest calendar year experience from July 1, 1979 through June 30, 1980.

I. Summary of Texas Policy Year Data - Stevedoring Classes Only

Policy Year	Earned Premiums At Present Rates	Losses & Loss Adjustment Expense	Loss And Loss Adj. Ratio
1977	$27,134,175	$18,409,165	67.8%
1978	26,026,814	13,266,133	51.0
TOTAL	$53,160,989	$31,675,298	59.6%

II. Summary of Texas Calendar Year Data - Stevedoring Classes Only

Policy Year	Earned Premiums At Present Rates	Losses & Loss Adjustment Expense	Loss And Loss Adj. Ratio
12 Months Ending June 30, 1980	$30,714,349	$20,351,613	66.3%

III. Final Indicated Change in Manual Rate Level - Overall Basis

(1) Policy Year Loss & Loss Adjustment Ratio (Item I)	59.6%
(2) Calendar Year Loss & Loss Adjustment Ratio (Item II)	66.3%
(3) Average of (1) and (2)	63.0%
(4) Permissible Loss and Loss Adjustment Ratio	66.3%
(5) Indicated Change in Overall Manual Rate Level [(3)÷(4)]	.950(-5.0%)

TEXAS WORKERS' COMPENSATION
RATE DEVELOPMENT OCTOBER 1, 1980
STEVEDORING CLASSES

IV. The indicated rates and rating values for the Stevedoring Classifications to become effective October 1, 1980 are as follows:

BASED ON $300 PAYROLL LIMITATION RULE

Class Code No.	Rate Including Disease	Minimum Premium	Expected Loss Rates Col. (1)*	Col. (2)**	"D" Ratio Standard
7309F	50.70	500.	29.53	27.58	.50
7313F	10.87	400.	6.65	5.91	.56
7317F	11.84	434.	8.04	6.44	.51
7323F	A	A	A	A	A
7327F	A	A	A	A	A
7350F	21.26	500.	13.38	11.56	.59
8709F	4.06	167.	2.53	2.20	.54
8726F	3.19	137.	1.98	1.73	.55

*Column (1) applicable to payrolls accumulated under the $200 Payroll Limitation Rule.

**Column (2) applicable to payrolls accumulated under the $300 Payroll Limitation Rule.

STEVEDORING CLASSES
(7309F, 7313F, 7317F, 7323F, 7327F)
DISTRIBUTION OF THE TEXAS WORKERS' COMPENSATION PREMIUM DOLLAR EFFECTIVE OCTOBER 1, 1978 SHOWING THE EFFECT OF EXPENSE GRADATION

STEVEDORING
TEXAS WORKERS' COMPENSATION
RATE DEVELOPMENT EFFECTIVE 10-1-78

he Discounts by Premium Groups are as follows:

(1) Standard Premium	(2) Discount For Acquisition And General Expenses	(3) Factor To Reflect Additional Savings On Tax (5.1%) And Profit and Contingencies (2.5%)*	(4) Total Discount (2)+(3)
irst $ 1,000	0.0%	--	0.0%
ext 4,000	8.8	.924	9.5
ext 95,000	13.8	.924	14.9
ver 100,000	15.3	.924	16.5

(1.000 - .051 - .025 = .924)

xpense Provisions by Premium Groups are as follows:

(1) Standard Premium	(2) Acq. & Other Prod. Exp.	(3) General Expense	(4) Profit & Contingencies	(5) Taxes	(6) Total Expense Allowance	(7) Discount
irst $ 1,000	17.5%	8.7%	2.5%	5.1%	33.8%	0.0%
ext 4,000	12.5	4.9	2.3	4.6	24.3	9.5
ext 95,000	7.5	4.9	2.1	4.4	18.9	14.9
ver 100,000	6.0	4.9	2.1	4.3	17.3	16.5
verage	6.5%	4.9%	2.1%	4.4%	17.9%	15.9%

(1) Standard Premium	(2) Stevedoring 1976 Policy Year Texas W.C. Premium Distribution	(3) Percentage Distribution	(4) Provision For Expenses
First $ 1,000	$ 68,306	0.5%	33.8%
Next 4,000	241,358	1.7	24.3
Next 95,000	3,421,851	24.0	18.9
Over 100,000	10,516,920	73.8	17.3
	$14,248,435	100.0%	17.9% Average

STEVEDORING
TEXAS WORKERS' COMPENSATION
RATE DEVELOPMENT EFFECTIVE 10-1-78

1. The premiums are 15.9% lower than the premiums that would be produced if manual rates applied to all risks. Thus, the company collects only 84.1¢ of the manual classification dollar out of which 66.2¢ goes for losses and loss adjustment expense leaving 17.9¢ (instead of 33.8¢) for expenses, taxes and contingencies or profit. The premiums actually collected because of premium discounts by premium brackets are as follows:

	STANDARD PREMIUM				
	First $1,000	Next $4,000	Next $95,000	Over $100,000	Average
Loss & Loss Adj.	66.2%	66.2%	66.2%	66.2%	66.2%
Expenses	26.2	17.4	12.4	10.9	11.4
Taxes	5.1	4.6	4.4	4.3	4.4
Profit & Contin.	2.5	2.3	2.1	2.1	2.1
	100.0%	90.5%	85.1%	83.5%	84.1%

2. Since the company collects only 84.1¢ out of each manual classification premium dollar, below is set out the distribution of the net workers' compensation dollar actually collected. The percentages available for Losses and Loss Adjustment, Expenses and Profit and Contingencies by premium brackets are as follows:

	STANDARD PREMIUM				
	First $1,000	Next $4,000	Next $95,000	Over $100,000	Average
Loss & Loss Adj.	66.2%	73.2%	77.8%	79.3%	78.7%
Expenses	26.2	19.2	14.5	13.0	13.6
Taxes	5.1	5.1	5.2	5.2	5.2
Profit & Contin.	2.5	2.5	2.5	2.5	2.5
	100.0%	100.0%	100.0%	100.0%	100.0%

3. Therefore, based on the premium actually collected, the average provisions for Losses and Loss Adjustment, Expenses and Profit and Contingencies are as follows:

Losses and Loss Adjustment	78.7%
Expenses	13.6
Taxes	5.2
Profit and Contingencies	2.5
TOTAL	100.0%

TEXAS WORKERS COMPENSATION RATES

CLASS			CURRENT RATE	
7309F - STEVEDORING N.O.C.			$ 50.70	
7350F - FREIGHT HANDLERS FEDERAL ACT			21.26	
7360 - FREIGHT HANDLERS STATE ACT			8.37	
7704 - FIREMEN			2.04	
7720 - POLICEMEN			4.19	
1322 - OIL OR GAS WELL SERVICING			13.22	
6233 - PIPELINE CONSTRUCTION			11.63	
2702 - LOGGING OR LUMBERING			10.68	
5057 - IRON OR STEEL ERECTION N.O.C.			9.66	
5213 - CONCRETE CONSTRUCTION			8.71	

Senator NICKLES. Mr. Huff, we appreciate your cooperation and your past activities in working. I have glanced at a piece of paper that showed the longshore premiums in Texas at 50-some-odd dollars. Is that correct?

Mr. HUFF. The present rate, based on a $300 payroll limit, is $50.70. That would be the base rate. There would be a discount involved by premium volume. As you pay more in premium, of course, some of your costs are the same, so therefore, you discount the premium.

Senator NICKLES. You said based on $300. So you would pay $150 per employee per month?

Mr. HUFF. Well, it would depend on the dollar amount of the premium. The average probably would be about 86 percent of that because of the effect of the discount.

Senator NICKLES. OK. If an employee is making $20,000 a year, what would the premium be in Texas?

Mr. HUFF. Well, the premium per employee would be limited to this $300 limit. If he was making more than that, it would cut off at $300. Most States have gone to an unlimited payroll, but Texas and Louisiana are two that have not.

Senator NICKLES. That is what I was trying to figure out. The $300, is that $300 per month?

Mr. WHATLEY. Per week per employee.

Senator NICKLES. Per week. The premium cost would be that rate, $50, times 3, times 52, I guess.

Mr. WHATLEY. That is correct.

Senator NICKLES. Whatever that is. Are you still actively writing insurance nationwide? You mentioned you did on the east coast.

Mr. HUFF. No. We have consistently restricted our writings to the gulf coast. We write from Texas to Florida.

Senator NICKLES. Did you used to write on the Northeast?

Mr. HUFF. No.

Senator NICKLES. You mentioned a point, if you could just touch on it a little bit further. You mentioned in our legislation, we put a cap on the permanent total——

Mr. HUFF. On the escalations.

Senator NICKLES [continuing]. On the escalations, the 3 percent, but you mentioned that there was a fence that you are trying to jump—there is no escalation for—would you expand on that?

Mr. HUFF. This is a problem that you would get into in any act that has the escalation feature, in that if it is an injury where you do not know if it is a total and permanent or maybe a permanent partial disability, the dollar amount difference between the two is very substantial. It might be the difference between $400,000 and $50,000 or $60,000. And you do not know—these things develop over a period of time. A back injury, for example, might suddenly become a T and P, after a period of time. I do not know how you could provide any feature in the act that would solve that problem. That is a common claims problem, I think, in any act.

Senator NICKLES. Do other States—and I am aware that your company writes other workers' compensation besides longshoremen—do other States have unlimited escalation of benefits—do State plans?

Mr. HUFF. Mr. Chairman, I do not know of any that have unlimited. There are some that have some escalation features. I believe Connecticut, at least at one time, had it; Alaska, I think, has it; Illinois at one time, I believe; I think Minnesota. There are a few States that have some sort of an escalation feature in the act. I do not think there are any that have unlimited escalation.

Senator NICKLES. I might address this to your actuary. Is the escalation feature, as it is in the act today, an unlimited—I guess escalation is based on national average wage——

Mr. WHATLEY. That is correct.

Senator NICKLES. How expensive is that escalation portion? I am not looking for a dollar figure, but I remember looking at some pension cost figures, and when you had COLA's, basically, you doubled the price of the pension fund.

Mr. WHATLEY. Senator, on average, we have done some calculations and estimate that on the death cases, on an average death case, going from no escalation to a 5-percent escalation doubles the value. Going to 6 percent, two and a half times; and going to 9 percent would be five times. And the way it is written now, being unlimited, the escalation so far, since 1972, has been as low as 6, but has been over 8. So it varies, and not having any kind of cap, it could be 9, 10, or whatever. And being a prefunded program, like workers' comp is in a private market, then it is hard to price that kind of exposure. Nobody can guess what inflation is going to be.

Senator NICKLES. Your company, to stay fluid, ends up having to guess or prejudge on the higher ends, on some estimates, plus your past experience. So ultimately, the employer is paying the higher premiums; you charge higher premiums, they pay higher premiums, their costs are higher.

Mr. WHATLEY. That is correct.

Senator NICKLES. And it is just a vicious kind of circle.

To give me a better idea—we talk about Texas—Texas is a little more difficult because you have the $300 not on full salary. How have premium rates increased since 1972? We have seen the benefits escalation chart, which is down here, but premiums, say, for the State of Texas or the State of Oklahoma, or the State of Florida—do you have some charts that we could put into the record to show what you used to charge several years ago and what you charge to date?

Mr. HUFF. Are you talking about for stevedores?

Senator NICKLES. For stevedores, yes.

Mr. HUFF. Yes; in the statement itself is the rate calculations and data prepared by the Actuarial Division of the State Board of Insurance of Texas. This is their own staff. It has the history from October 1 of 1960 through the current.

Senator NICKLES. What were the rates in 1972?

Mr. HUFF. Right before the act, October 1 of 1972, it was $24.10.

Senator NICKLES. For all the payroll, or for the first $300?

Mr. HUFF. That was on a $200 payroll.

Senator NICKLES. That was on $200. Now you are up to $300 on payroll, and the rates are——

Mr. HUFF. $50.70.

Senator **Nickles**. That would be an increase of more than double, plus another 50 percent again. The premiums have done what—doubled plus 50 percent—so it is three times?

Mr. **Whatley**. Three times.

Mr. **Huff**. He almost got his calculator out for you.

Mr. **Whatley**. We will skip that.

Senator **Nickles**. I have some comments about actuaries, but I will not make them for the record.

Mr. **Huff**. So do we. [Laughter.]

Senator **Nickles**. Paula, do you have any questions?

Senator **Hawkins**. You stated you insured in Florida.

Mr. **Huff**. Yes, ma'am.

Senator **Hawkins**. Did the reform of workmen's compensation laws in Florida in 1979 affect the premiums you charged?

Mr. **Huff**. Well, we write just for the stevedores there. I do not believe they have any State act coverage there.

Senator **Hawkins**. Not yet.

Mr. **Huff**. Not yet.

Senator **Nickles**. Does the Insurance Co. of North America?

Mr. **Lachner**. Yes, we have a substantial business in Florida. It was very interesting. Previous to the changes, Florida had tremendous problems. They were contributing to the assigned risk function, because everybody was going to the assigned risk. The insurance companies were having extreme difficulties there. Rates had soared to incredible amounts of inadequacy. National Council rates were up in the 40-percent-inadequacy bracket. And since the change in the law, the inadequacy levels of the rates do not exist, and as a matter of fact, the rates have been actually less than they were previous to the law change. It has been a tremendous boon to the employers and to labor in the State; there is no question about it. It also made it much better from a competitive viewpoint for insurance companies to be able to write business in the State of Florida.

Senator **Nickles**. Have the law changes you made—and Senator Hawkins referred to some substantial changes in Florida's workers' compensation laws, not relating to stevedores, but in State workers' compensation—has that hurt the working men and women of Florida?

Mr. **Lachner**. I cannot comment on that. I do not see that it possibly could have.

Senator **Nickles**. The people who are injured are still receiving——

Mr. **Lachner**. Oh, yes. The change in the law based compensation on a wage loss theory, rather than on a statutory schedule of disability benefits.

Senator **Nickles**. Thank you.

Mr. Lachner, would you care to give your statement?

Mr. **Lachner**. Mr. Chairman and members of the subcommittee, I am William E. Lachner, vice president of the Insurance Co. of North America. I have been in the workers' compensation field for 29 years and am currently the senior workers' compensation underwriting officer for INA's special risk division.

The Insurance Co. of North America ranks among the Nation's 10 largest property-casualty insurers in premiums written and is one of the top 5 writers of workers' compensation insurance. Last year, the company wrote approximately $25 to $30 million premium in longshore coverage.

I am pleased to be here today to express INA's support of Senate bill 1182, the Longshoremen's and Harbor Workers' Compensation Act amendments. I would like to commend Senators Nickles and Nunn for their cosponsorship of this bill, as well as Senator Hatch, for his support in conducting these hearings.

The need for appropriate congressional action is clear. The cost for Longshore Act coverage has become so great that it is rapidly becoming unaffordable. No benefit program should ever be so constructed that pricing becomes mere guesswork. When certainty vanishes, then insurers tend to remove themselves from the marketplace. This has occurred in the longshore area, where all but a few of the insurers have left the marketplace.

One of the key areas in having this bill passed is that it will take a great deal of the uncertainty out of the ultimate cost. Thus, it will allow the insurance industry to do a more concise evaluation of the rating structure in the various States to determine the adequacy of the rates.

If they find that the rates are now based upon a reasonable representation of exposures, you will find many insurance companies back in the competitive market which simply are not in it today.

The more competition you have in any marketplace, the sharper the pricing always becomes, and it is our feeling that this will occur in a relatively short period of time. We believe the provisions in Senate bill 1182 will enhance the market environment by making premium costs predictable, stable, and most importantly, less costly to our customers. Predictable, because of provisions such as limiting the cost of living increase, better-defined exposure, and establishing maximums for several benefit sections. Stable, because of benefit level certainty. Less costly, because the total payout would be carefully controlled by this bill. More reasonable costs would be established through some following corrections: more restricted jurisdiction. In our opinion, this legislation will redefine the critical terms and delineate carefully its territorial application. INA believes the proposed benefits will enable employees to maintain their standard of living without being so high as to offer a disincentive to return to work.

Unrelated death benefits that are more a function of life insurance than a compensation plan should be eliminated.

Choice of physician should remain with the employee, but from lists approved by the employer.

Subsequent injury recognition should be facilitated by a requirement that doctors perform independent medical examinations, distinguish current impairments or disabilities from previous injuries.

INA believes that the cost-of-living increase held to a maximum of 3 percent per year should keep the cost factors down and eliminate a great deal of uncertainty in the ratemaking process.

Repeal of the statutory presumptions relating to coverage, notice, intoxication and willful intent should result in fairer administrative proceedings. INA supports passage of this legislation because it should lead to increased competition by insurers in the marketplace. Costs would be anticipated to be reduced, and the compensation system should operate more efficiently.

I appreciate very much, Mr. Chairman, the opportunity to appear, and I would be pleased to answer any questions at this time.

[The prepared statement of Mr. Lachner follows:]

STATEMENT OF WILLIAM E. LACHNER
VICE-PRESIDENT
INSURANCE COMPANY OF NORTH AMERICA
before the
SUBCOMMITTEE ON LABOR
SENATE COMMITTEE ON LABOR & HUMAN RESOURCES
June 16, 1981

Mr. Chairman, and members of the subcommittee, I am William E. Lachner, Vice President of the Insurance Company of North America. I have been in the Workers' Compensation field for twenty-nine years and am currently the Senior Workers' Compensation Underwriting Officer for INA - Special Risk Division. The Insurance Company of North America ranks among the nation's ten largest property-casualty insurers in premiums written and is one of the top five writers of Workers' Compensation insurance. Last year the company wrote approximately $25-30 million premium in Longshore coverage.

I am pleased to be here today to express INA's support of S. 1182 the Longshore and Harbor Workers' Compensation Act Amendments. I would like to commend Senators Nickles and Nunn for their co-sponsorship of this Bill as well as Senator Hatch for his support in conducting these hearings.

The need for appropriate Congressional action is clear. The cost for Longshore Act coverage has become so great that it is rapidly becoming unaffordable. There are many reasons for this, chief of which is unnecessarily high benefits, that are paid under what we consider unintended circumstances. We believe these provisions will enhance the market environment by making premium costs predictable, stable and most importantly less costly to our customers.

Predictable because of provisions such as the limitation of the cost of living increase; better defined exposure; and, establishing maximums for several benefit sections.

Stable because of benefit level certainty.

Less costly because the total payout is carefully controlled by this Bill.

More reasonable costs would be established through the following technical corrections: (citations are to S. 1182)

1. More restricted jurisdiction. (Section 2 & 3)
   The first task of an underwriter is to identify the class of employees comprising the exposure. Accuracy

in this determination is critical because payroll is necessary in determining premium. The Longshore Act currently makes ratemaking nearly impossible because there is no clear identification of which employers or employees are subject to the Act. Particularly with regard to peripheral activities such as trucking, problems are created. For example, the loading or unloading of trucks around dock areas may or may not expose an employer to the requirements of the Longshore Act. A second example would be clerical employees whose office may be near the waterfront. As a result of these ambiguities, attempts to identify the class by place of employment has been subjected to judicial case by case determination of situs & status of both employers and employees, using traditional maritime employment criteria. In our opinion, this legislation will redefine the critical terms and delineate carefully the territorial application. Reducing uncertainty in ratemaking will help to contain premium costs.

2. Benefits (Section 4)

   a. Benefit Level Computation. The Bill will change the current level of payments from 66 2/3% of the average weekly wage to 80% of spendable earnings. Generally, spendable earnings are approximately 80% of gross pay. The formula would yield an equivalent of approximately 64% of gross earnings. The new rate will work to the advantage of younger employees who, because of lower income will have a lower tax liability. INA believes it is appropriate to have a formula that protects young employees since statistics show they sustain the most injuries. The proposed calculation of benefits will enable employees to maintain their standard of living without being so high as to be a disincentive to return to work.

b. Maximum Weekly Benefit Level. (Section 4,7 & 10) The 1972 amendments have been judicially construed to mean that death benefits are not subject to the limitation provision. The legislation will make the maximum benefit payable applicable to death benefits as well as disability. We do not believe that unlimited death benefits were intended by the Congress. This Bill remedies that drafting error.

In addition, persons with disabilities that are total in nature but temporary in duration or partial in nature but permanent in duration would have benefits terminated upon retirement. This recognizes the fact that such an employee would transfer to permanent total status, or would be earning some wages by virtue of his non-totally disabled status.

Under the proposed legislation, permanent partial benefits will be capped at 312 weeks (6 years benefits). This limitation would lead to more predictable costs.

c. Unrelated Death Benefits. (Section 6) The current provision for unrelated death benefits would be stricken. These are benefits that are paid to survivors for the death of a permanent partial or totally disabled employee who dies from causes wholly unrelated to the occupation or disabling injury. An example would be an employee who sustains a crippling injury such as a severe back or spinal cord problem but dies of a congenital heart attack. In our opinion, payments to survivors for deaths wholly unrelated to employment are a function of life insurance. Such payments were never intended to be part of a Workers' Compensation program.

3. Medical (Section 5)

a. Choice of Physician. An employee would still have the right to choose the treating physician but only from a list promulgated by employers and approved by Deputy Commissioners. It should be kept in mind that approximately 95% of all injured employees return to work relatively quickly without any element of permanency. For the large number of relatively simple injuries a requirement that the employee choose a physician from an approved list could be burdensome. Severe industrial injuries, however, may require sophisticated medical treatment.

While all physicians are required to pass medical examinations there are many practitioners that may not be the best qualified to treat employees who suffer mangling industrial injuries. Recognition of severe, disabling injuries requires specialized medical care. Employees receiving specialized care have been able to return to work much sooner and without severe permanent disability. INA believes employers should have a list available from which they could request, depending on injury severity, change of treating physicians to specialists.

b. Specialist Referral. Employers would have more control over specialist referral. The bill would require that employers receive notice of a proposed specialist referral together with a written statement of reasons for such referral. Liability of an employer for the reimbursement of the cost of services would depend upon an employer's receipt of written medical reports in a timely fashion. This provision gives current rules and procedure the force of statute. This will benefit the employee by allowing prompt medical evaluation and rehabilitation.

c. Disability Resolution. There would be a requirement that doctors performing independent medical examinations should endeavor to distinguish current impairments or disabilities from previous injuries. This would aid more effective recognition of subsequent injury fund entitlement.

Compensation proceedings would be suspended if an employee unreasonably refuses medical or surgical treatment or an examination. Under the current law suspending payments is discretionary. The new provision would mandate a suspension of proceedings and payments on a finding of unreasonable refusal on part of the employee. INA recognizes compelling employees to submit to examinations or a course of medical treatment is not of itself a desirable end. Nonetheless, in some instances forcing cooperation is necessary. An employee who fails to keep doctor's appointments or undergo a simple hernia operation can create claim stagnation. These delays are non-productive and costly. The "reasonableness" test is, INA believes, an appropriate safeguard to the sanctity of a person's right to control his own medical treatment.

4. Cost of Living Increase. (Section 8(b))

Death benefits and permanent total disabilities would be escalated by a maximum of 3% per year. Presently, permanent partial disabilities are also escalated and there is no maximum. To date, since 1972, the annual increase has been approximately 7% per year.

The difference between 7% and 3% for a permanently, totally disabled 30-year old is dramatic: The amount of benefits paid in the 40th year, assuming 7% escalation, would be four times the benefits paid at a 3% rate. The difference in total payout for the life expectancy period would be $5,091,511 compared to $1,866,168. Furthermore, a widow with a longer life expectancy would receive slightly more. Escalation by the annual cost of living is the single largest factor of high costs. It also represents overpayment of compensation since a non-taxed increase of 7% is equal to more than the 7% for working people.

INA believes employees who sustain injuries that prevent them from earning wages should be able to keep pace with their pre-injury standard of living. The legislative extension of an annual increase that is capped accomplishes that objective while containing the cost.

5. Administration (Section 12)

The statutory presumptions relating to coverage, notice intoxication, and willful intent would be repealed. These presumptions operate to the disadvantage of employers resulting in unfair administrative proceedings that are costly with little chance of overcoming the presumption.

The current law requires an employer to prove that an injured employee can work or else an award of permanent total may be made. This burden is a difficult one often requiring employers to act as employment agencies. Employers often find jobs for injured employees solely to avoid a finding of permanent total disability. The legislation would shift the burden of proof to the employee so that total disability awards would be permitted only if there is substantial evidence of an inability to earn any wages. The presumption that loss of any two limbs or both eyes constitute a permanent total disability in the absence of conclusive proof to the contrary would remain the same. An employee who sustains an impairment which results in a job disability is in a better position to prove its economic impact than is the employer. INA believes the new burden of proof to be fairer and more in keeping with true compensation philosophies.

Under the Bill, an employee would have to be evaluated for a vocational rehabilitation program prior to an award of permanent total disability. In addition, any rehabilitation program that is started would have to be finished before issuance of an award prior to an award of permanent total disability. The intent of this requirement is to give the employee every opportunity to return to suitable gainful employment before an irrevocable decision is made as to permanency.

INA supports passage of this legislation because it should lead to reduced costs for employers and predictable, stable pricing. Affordability should be enchanced by the ability to accurately measure exposure.

I appreciate very much, Mr. Chairman, the opportunity to appear and I would be pleased to answer any questions.

Senator NICKLES. Thank you, Mr. Lachner. I am going to ask you a question, but first I would like to ask Mr. Hughes if he would give his statement. Then I will ask the panel, and any one of the three of you might answer the questions.

Mr. HUGHES. My name is James F. Hughes. I am the vice president of Midland Insurance Co., with corporate offices in New York City.

With the committee's permission, I would like to enter my statement into the record and summarize it.

The Midland Insurance Co., since its incorporation, has been a dominant insurer in the field of Federal workers' compensation on a nationwide basis. Our premium volume is considerable. It amounts to over $30 million. Accordingly, the proposed changes or amendments to the Longshoremen and Harbor Workers' Act aim to eliminate inequities, uncertainties, and abuses is deemed essential.

The Midland Insurance Co. takes no issue with the overall concept of the Longshoremen and Harbor Workers' Act. It does, however, contend that serious flaws exist in the 1972 amendments to the act, as both written and interpreted. These flaws characterized by uncertainty, lack of predictability and vagueness produce exceptionally high costs and preclude the effective administration of the act by insurers, self-insurers, and able staff members of the Federal Office of Workers' Compensation programs.

A significant revision in sections 2 and 3 of the act, clarifying and limiting employees covered and the circumstances under which they are covered, would resolve this problem and administrative dilemma.

Presently, certain provisions of the Longshoremen and Harbor Workers' Act encourage litigation, discourage rehabilitation and induce injured workers not to return to gainful employment.

Other segments of the act invite the filing of unjustified or exaggerated claims; provide for benefits exceeding preinjury take-home pay; or operate to insure lifetime survivor benefits where a permanently disabled worker dies from unrelated causes.

The natural consequence of that disastrous trend, if allowed to continue, will further deteriorate the already detrimental economic position to employers who come under the act. A counterbalance in the form of substantive changes to the Longshoremen and Harbor Workers' Act will reverse that trend.

The basic problem is not new. Innumerable studies along with congressional committee hearings have been directed to the need for remedial legislation to amend and revise the act. This documented mandate for change is necessary for the survival of the Federal Workers' Compensation system.

In conclusion, the Midland Insurance Co. likewise supports the Labor Subcommittee of the Labor and Human Resources Committee toward enacting long overdue Longshore Act improvements this year.

I, too, am appreciative of coming before this committee.

[The prepared statement of Mr. Hughes follows:]

STATEMENT OF MIDLAND INSURANCE COMPANY BEFORE THE SENATE LABOR SUBCOMMITTEE OF THE LABOR AND HUMAN RESOURCES COMMITTEE

Re: S. 1182

A Proposal to Amend and Revise the Longshoremen's and Harbor Workers' Compensation Act

Chairman Nickles and members of the Senate Labor Subcommittee of the Labor and Human Resources Committee, the Midland Insurance Company supports the general thrust and direction of Senate Bill 1182. The proposal will in our judgment have the following positive results:

- make insurance more available in the market place for those seeking Longshoremen's and Harbor Workers' Act coverage
- eliminate many uncertainties and inequities in the Act

My name is James F. Hughes, Vice President, Midland Insurance Company, a stock insurance company writing as a significant part of its business approximately thirty-five million dollars in premiums pursuant to the Longshore and Harbor Workers' Act. Midland originated as an insurance carrier to provide Longshore coverage for stevedoring operations. Its long history in the field has enabled it to survive while other carriers have found it necessary to leave the market place.

The various areas of concern that S. 1182 addresses which we have selected to comment on are as follows:

JURISDICTION

Sections 2 and 3 of the bill do much to return the Act to what we believe was its original purpose, specifically to cover longshoremen "...engaged in the loading or unloading of cargo between vessels upon the navigable waters of the United States and the point of rest." Removed is the troublesome language added by the 1972 amendments relating to the definition of "employee" which provides that the Act further include "...any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employee in loading, unloading, repairing, or building a vessel." This extension of the Act created a fertile ground for litigation and from an insurance perspective caused great uncertainty as to the extent of the risk being insured. The return to "point of rest" along with other clarifying language of Sections 2 and 3 create certainty of risk for insurance underwriters to deal with.

BENEFITS ESCALATION

Section 10(f) of the current Longshore Act as amended in 1972 provides that on October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after the date of enactment of this subsection shall be adjusted annually based on increases in the national average weekly wage. The uncertainty of the future increases based on the national average weekly wage is a principal factor in the retreat of much of the insurance industry from this segment of the market.

The proposed change to this section would limit the cost-of-living adjustment to the determination on October 1 of each year of "...the applicable national average weekly wage, as determined, for the period beginning with the preceding October 1; or (2) by 3 per centum; whichever percentage is less..."

We believe this is the correct approach and will again add certainty to the Act.

UNRELATED DEATH BENEFITS

The Longshore Act is the only workers' compensation law paying death benefits to survivors of permanently disabled employees when the death was not employment or employment-injury related, such as by murder or suicide. This costly form of life insurance was not contemplated when the Act was originally passed, and it further complicates the matter of risk predictability.

The proposal repeals this section -- again the correct action.

WEEKLY BENEFITS — DEATH CASES

Through an admitted drafting oversight, death benefits are not subject to the maximum of 200 percent of the national average weekly wage. Nevertheless, the Supreme Court has expressly stated that the Congress must correct this error. The bill caps the maximum at 200 percent of the national average weekly wage — the solution we believe was intended originally.

COMPUTATION OF WEEKLY BENEFITS

Section 6 of the Act as set forth in the proposal would change the computation for weekly benefits to 80 percent of spendable earnings rather than the traditional 2/3 of average weekly wage. We believe this recommendation of the National Commission on State Workmen's Compensation Laws will lessen work disincentives which are escalated when benefits are set at a maximum of 200 percent of the national average weekly wage.

MEDICAL SERVICES AND SUPPLIES

The various proposals to amend Section 7 of the Act pertaining to medical services and supplies are significant. However, of great importance is the return of supervisory authority to the deputy commissioner. This places responsibility at the local level where it should be, rather than having direction coming from the Secretary of Labor who is away from the day-to-day medical activities of the program. Such a step would benefit the injured worker most of all.

In conclusion, we believe the sponsors are to be commended for their effort, and we hope the Congress will see fit to enact long overdue Longshore Act improvements this year.

Thank you.

###

Senator NICKLES. Thank you.

I would like to address several questions to the entire panel. I think Texas Employers mentioned that you write primarily in the gulf coast area?

Mr. HUFF. Yes, sir.

Senator NICKLES. Do you still actively seek and solicit longshore-type work? Would you continue to do that if amendments were not made?

Mr. HUFF. Well, I am not sure I agree with your statement, that we are "actively" seeking——

Senator NICKLES. Well, correct me.

Mr. HUFF. We are staying in the marketplace along the Texas and Louisiana gulf coast.

Senator NICKLES. Is it too much of a mess, unless changes are made?

Mr. HUFF. Well, that thought has certainly crossed the minds of certain of our officers. We are at the present time staying in. We might even write a good account if one would come up. Midland is our main competition down in that area; self-insurance is the other. We would probably not expand outside of the gulf coast area. That is where our expertise is. Our other business is concentrated in the Oklahoma, Texas, Louisiana area, and we probably would not expand our writings outside the gulf coast area, even with these amendments.

Senator NICKLES. How far does Midland go? Is it the same gulf coast region?

Mr. HUGHES. Sir, we write on a nationwide basis.

Senator NICKLES. You write Northeast, Northwest——

Mr. HUGHES. And Southeast, Southwest; even the Tulsa Port.

Senator NICKLES. And the Insurance Co. of North America?

Mr. LACHNER. Actually, while we are set up to handle this class of business nationwide, because of the rating problems that have been discussed here, we have confined our writings almost exclusively to the west coast; and, even more specifically, California and Washington.

Senator NICKLES. Earlier testimony brought out a lot of fraud and corruption. Have you witnessed, seen, felt—I think testimony was earlier presented from a gentleman concerning Boston, I believe, or someplace in Massachusetts where, upon termination of the facilities, a large number of the employees went to the same doctors, filed the same type of a claim. Have you seen this type of occurrence?

Mr. MOORE. Well, there may be individual cases of fraud and/or exaggeration. We are unaware of anything like the organized crime effort. I think, frankly, the waterfront along the gulf coast is a relatively clean operation. I certainly hope it is not there.

Senator NICKLES. Mr. Huff?

Mr. HUFF. Mr. Chairman, I might say that part of that is not uncommon if the plant closes or if a company gets into financial difficulty; whether it is longshore or any other type of business, I think you will find an increase in the number of claims, and I think you have seen that in Michigan and other areas, where plants have closed.

Senator **Nickles**. Almost every witness today has alluded to the eligibility requirements which we have addressed, and to my knowledge, I think almost everyone said that the definitions in the legislation that we have proposed are pretty definitive and would clear up a lot of the ambiguities and the far-reaching effects of current law. Almost everyone has mentioned, usually with a very high priority, the unlimited escalation of benefits which we addressed.

I have not heard very much comment concerning the coordination of benefits. Is this a major factor? Do you find very much pyramiding of benefits, say, longshore benefits on top of social security, disability, or whatever?

Mr. **Huff**. We alluded to this problem in earlier testimony before both the House and the Senate, of cases in which an individual was drawing—in fact, with Senator Williams, we got into a discussion of the situation of using this in essence as another retirement program—but we have alluded to instances where you see an individual drawing from two or three different sources, and his after-injury pay is substantially higher than what he was earning when he was working.

Senator **Nickles**. Is that very commonplace? We addressed that and approached it from a different angle or two, trying to ensure that the plan as designed would not be 150 percent of take-home pay. Have you found many cases where individuals, either through Longshore, plus other disability benefits may have, either through social security or pensions or other forms, exceed their take-home pay previous to the injury?

Mr. **Moore**. I think it is very common, and I think it is one of the real serious problems with the present act, yes, sir.

Senator **Nickles**. OK. What about the occurrence of the claims at or around retirement age; have you found that this is a higher occurrence, as was alluded to earlier?

Mr. **Moore**. Again, you have a real disincentive for the injured workman to go back to work, and those constitute real problems to us. When we have an individual who, for some reason we have a more difficult time than we should in getting him back to work, then about that time, we find that he is also drawing social security benefits and other benefits, it is almost impossible, when a man makes more money off work than he does if he goes back to work.

Senator **Nickles**. Because the benefits are tax free?

Mr. **Moore**. Correct.

Senator **Nickles**. Because the benefits would entitle him to death benefits later?

Mr. **Moore**. That is part of it, yes, sir.

Senator **Nickles**. Are those death benefits tax free?

Mr. **Moore**. Yes, sir.

Mr. **Hughes**. Senator, what we were remarking before as to age, late age—you said something about that——

Senator **Nickles**. Yes.

Mr. **Hughes**. I think you will find, especially in the Port of New York, the average age of the longshoreman is in the fifties. These people have been working at these particular areas for many years, and when they incur injuries, they are usually long term. And return to work is most difficult, even if you have individuals who are malingerers; this is very hard to discern.

Senator NICKLES. I am not sure I caught or heard all of your comments. Are you saying the majority of the cases in New York are filed by people in their fifties or when they have that initial injury?

Mr. HUGHES. No, you do not usually find it is initial injury at that particular stage of their lives. They have had several injuries. It would not be, say, out of order, if a particular longshoreman, over a 15-year period, would have seven or eight.

Senator NICKLES. Are you talking about permanent partials?

Mr. HUGHES. No, they could be just—some soft tissue injuries with no resultant time lost from work; some are permanent partial, various sections of the body.

Senator NICKLES. In your case, especially with the accumulation of these, would you find many people who would be making a lot more money by not working than by working?

Mr. HUGHES. Eventually, yes.

Senator NICKLES. We attempted—and I have not heard anybody address this, and I would very much appreciate your input on it—to change the benefit formula from the two-thirds of gross pay, basically, to 80 percent of spendable income. Would you address that—plus, minus?

Mr. LACHNER. Well, yes, we absolutely endorse the proposed change. Unfortunately, the formula based on two-thirds of gross pay could very easily provide a person with more money by staying off work than he would otherwise earn in terms of actual spendable income. So this formula change which puts everything on a very stable basis, because it is calculated on a percentage of spendable income and gives some motivation and incentive for the worker to return to work.

Senator NICKLES. Is the 80 percent figure magic? Is it too high, too low?

Mr. LACHNER. We have never really commented whether that was too high or too low, or really did any evaluation. Eighty percent seems to be a reasonable number.

Mr. HUFF. This came from the National Commission recommendations; that was one of their recommendations, and I think they estimated that the average withholding tax on the average wage would amount to about 20 percent.

I moved down to Texas from Iowa—that is my home State; I was born and raised there—and they have the 80 percent of spendable income in their compensation law and have had it in for several years, and it has worked well.

Senator NICKLES. In Iowa, have they found that it works better?

Mr. HUFF. That is my understanding, yes, sir.

Senator NICKLES. Do you think it would have a tendency to possibly eliminate the disincentive, especially if you couple that with the coordination?

Mr. LACHNER. It is not a question of any one of these single items. Where they really have impact is when you put them all together, because every time you can eliminate a disincentive to return to work, it is more likely the person is going to return to work.

Senator NICKLES. Are there any other comments any of you have as far as possible changes which you think we could or should make, in addition to what we have discussed previously?

Mr. HUFF. If we could, we would like to submit some additional comments in writing. We did not have a whole lot of time before these hearings. One—and I cannot even give you the exact section number—but it seemed to indicate that a medical doctor could in essence decide what was or was not paid out of the second injury fund, and I think that needs to be clarified, but I would be glad to submit it in writing, if I could.

Senator NICKLES. You addressed a couple other statements earlier regarding the second injury fund. I would appreciate your written comments on that, so we could peruse them. We are concerned about that fund, to say the least, and the potential liabilities that it could be looking at. We want to tighten those up. We made some initial provisions, but we would solicit additional comments on that.

All of you write workers' compensation, in addition to longshoremen. The longshore rates, as we have mentioned, have been very high. I have alluded to the New York figure because it is the most abused and probably the most corrupt.

In other States, as alluded to earlier, even in Oklahoma, we had longshoremen coverage. I did not know that until we started this endeavor. I did not know what we had gotten into until I got into this.

In the overall industry, I do not know if each one of you have in the back of your mind what the average longshoremen rates are as compared to your average rates, but I would be interested in those figures.

Mr. LACHNER. Could you repeat the question?

Senator NICKLES. We have been mentioning figures in Texas and Oklahoma. I am familiar with a company where they employ 100 people, and the average workers' compensation rate is probably in the $2, $3 range. Now we are talking about figures—I looked up Florida when Senator Hawkins was here, and it was 20-some-odd dollars per 100. And on and on and on.

Could you supply us with some statistics of here is what average compensation rates are, here is what the longshoremen rates are, to give us some kind of an idea if they are three times higher or five times higher?

Mr. LACHNER. Well, there are some difficulties involved. There are certain sections of the country—as an example, in the sections that we primarily write our book of business in, California and Washington—where there are no published rates, there are no actual rates published.

Senator NICKLES. I did not find one for Washington, and I do not find one for California.

Mr. LACHNER. That is correct. They are the two unjurisdictional States, as far as rates are concerned. So the rates are effectively, I guess, whatever can be agreed upon between the employer and the company.

Since there are no published rates, I would have to go basically from memory. But, going back prior to 1972, I would say that the normal or the average longshoremen and—stevedores, of course, are a very small percentage of the employers that we are involved in—I would say that the rates probably in that area have been up about three times. That would be pretty average; three times what they were.

Senator NICKLES. Three times what they were in 1972?

Mr. LACHNER. Prior to 1972, yes.

Senator NICKLES. How do they compare to—I am going to say other industries—I am trying to get some additional support for the difference in the rates between longshore and manufacturing companies, steel manufacturing?

Mr. HUFF. I have some figures for Texas.

Senator NICKLES. Please do.

Mr. HUFF. We took some of what we consider our most hazardous-type occupation States. As I mentioned for stevedoring n.o.c.—this is the manual rate—$50.70; freight handlers, Federal, would be $21.26; freight handlers, State, $8.37; firemen, $2.04; policemen, $4.19; and one that you are familiar with, I am sure, oil and gas well servicing, which is a very hazardous occupation in both States, $13.22; pipeline construction, $11.63; logging or lumbering, $10.68; iron or steel erection, not otherwise classified, $9.66; and concrete construction, $8.71.

Those would be State-type employment that we would consider hazardous.

Senator NICKLES. You had ranges all the way from about 10 times, 15 times—your most hazardous, I would think, would be steel erection, and so forth——

Mr. HUFF. Oil or gas servicing is very hazardous; those two—$13.22 is oil and gas well servicing.

Senator NICKLES. The coverage for offshore, which I guess all of you deal with to some extent, all of those are covered by longshore.

Mr. HUGHES. Fixed platform.

Senator NICKLES. Fixed platform, and deal under the Longshoremen Act.

Gentlemen, I think there will be additional questions, and if you do have additional comments concerning any of the sections, I would appreciate it. We very much appreciate your testimony before us today.

Thank you.

Our final guest today is Judge Samuel Smith, who is Chief Judge of the Benefits Review Board.

Welcome, Judge. I appreciate your statement; it is a very lengthy statement, and I have not had the opportunity to read it and I apologize. I glanced through sections of it hurriedly this morning.

I welcome you and very much appreciate your insight. I think your insight will be somewhat unique before this committee and before Congress. You have seen this particular program probably from a vantage point that no others possibly could. We are very interested in your comments concerning the past legislation, the proposed legislation, and any changes that we might be able to make. We look forward to working with you.

STATEMENT OF HON. SAMUEL J. SMITH, CHIEF ADMINISTRATIVE APPEALS JUDGE, BENEFITS REVIEW BOARD, U.S. DEPARTMENT OF LABOR, ACCOMPANIED BY BRIAN MEYERS, ACTING SENIOR BOARD ATTORNEY

Judge SMITH. Thank you, Mr. Chairman.

I would like to introduce to my left, Mr. Brian Meyers. Mr. Meyers was the Senior Division Attorney of our Longshore Division for approximately 3 years, and as of yesterday, he is the Acting Senior Board Attorney of the Benefits Review Board.

I appreciate your kindness in inviting me here today and giving me an opportunity to visit with you and discuss the Longshoremen's and Harbor Workers' Compensation Act, which I assure you has constantly been on my mind since September of 1977.

In pondering what my oral presentation should be, I was tempted to talk about a number of things. However, I came to the final conclusion that I would be doing a disservice to the workers who are covered under the Longshoremen's and Harbor Workers' Compensation Act, as well as their employers, if I did not advise you and the committee today of the rising storm of occupational disease cases that is descending upon this country and which will be felt by the employers and the employees.

As a matter of fact, I am preparing a very detailed paper entitled "The Rising Storm," which I will present to the American Bar Association in New Orleans this summer, and I will provide you and the committee with a copy within the next week or so.

I think, as a premise, we should start with the fact that the Longshore Act does not lend itself to an easy resolution of occupational disease cases. It especially does not lend itself to easy resolution of asbestosis cases, which is leading the parade of occupational disease cases now.

There are three basic problems with the act that I will outline for you. The first one concerns the identification of the disease, the second concerns the determination of the date when employee was injured, and the third concerns the identification of a responsible operator.

Now, with respect to the identification of disease, I would quickly point out to you that there are no medical standards, either in the Longshore Act or its implementing regulations. I listened very carefully to your opening statement: I listened very carefully to Senator Nunn's statement, and I listened very carefully to Senator Hawkins' statement. It seems clear to me that you want to see impartial medical examiners making impartial decisions in cases arising under the act.

I submit to you, Mr. Chairman, that unless you impose medical standards, then the impartiality will not be there, because if you have no standards, and you have no impartial physician, then you are opening the door to possible fraud. What I am suggesting to you is that not only should there be an impartial examiner, but there should be medical standards. I have looked in bill S. 1182 and there are two or three pages in the bill that deal with hearing loss. Well, I want to tell you that asbestosis is immeasurably more grave a problem than is hearing loss. If hearing loss deserves two or three pages in the bill, then asbestosis deserves six.

Something that I want to point out—the State of Florida has been mentioned a lot today. I want to tell you that if you impose medical standards a claimant cannot fake lung cancer, restrictive asbestosis disease, or mesothelioma.

Now, what can happen if action is not taken which I want to point out to you is that I have seen two cases where a doctor from the Northeastern part of the United States, based on a single chest X-ray, has testified by way of deposition that the claimant was suffering from totally disabling pleural asbestosis.

The fact is, Mr. Chairman, there is no such disease. The pleura is the lining of the lung. You can have thickening of the pleura, which is reversible. You can also have a mesothelioma, which is a cancer of the lining of the lung. But there is no such thing as totally disabling pleural asbestosis. I am suggesting to you, the only way that you can prevent testimony such as that from being carried away is to impose minimum medical standards in occupational lung disease cases which must be met before a diagnosis of asbestosis can be made.

Another point that I would like to bring up——

Senator NICKLES. Judge, just let me ask you a question. Would that apply primarily through FICA, as far as our committee's jursidiction is concerned, or would that also come under Longshore?

Judge SMITH. Yes, under the Longshore Act, because all of the shipyard workers, shipbuilders, ship repairmen, and ship brakers are all covered under the Longshore Act. So all of your shipbuilders—Bath Iron Works in Maine; Sun Shipbuilding in Philadelphia; Newport News Shipbuilding in Norfolk; Braswell, whose witness was here today; Jacksonville Shipyards; Todd Shipbuilding; Engle Shipbuilding; Bethlehem Steel; United States Steel—their employees are covered under this act.

I have a problem with a part of the proposed bill that I would like to call to your attention.

Senator NICKLES. Judge, let me advise you that I am going to have to scoot shortly for a rollcall vote. If we can go quick enough to wrap up in 5 minutes, fine; if not, I will vote, and we will be back in 15 minutes.

Judge SMITH. Five minutes would be a little hard to cover the things that I think should be covered, Mr. Chairman.

Senator NICKLES. Just proceed. We may have two or three votes stacked behind each other, or we may just have one vote.

Judge SMITH. There is a provision in the bill which is contained on page 28, which seems to say that State laws should be applied with respect to occupational disease cases and that the substantive workers' compensation law of the State in which the employee was last exposed should be used. I suggest to you, Mr. Chairman, that in my view, that is passing the buck, and that is precisely the problem that we have now.

This Longshore Act was overly broad, and Congress has passed the buck to the Department of Labor, and the Department has passed the buck on to the administrative law judges, the Board, and the courts, and we have had to field the hot grounders.

I think one of the things about the act which would be destroyed is the fact that a shipyard worker at Bath Iron Works in Maine would have the law construed to him the same as a shipyard worker in New Orleans, and the same as a shipyard worker in San Francisco. I believe that this provision would really undermine the purpose of the act.

Senator NICKLES. Judge, let me interrupt you. I found out we have four roll calls, which will take us an hour. So, if you will just hit the highlights, and then everything that you wish to will be entered into the record, plus I have some questions that I would like to ask you also, for the record.

Judge SMITH. I would be pleased to answer them for the record.

The next major category where the act is deficient is the determination of the date of injury because in section 22 of the act, time of injury, it is vague—does it mean date of last exposure, does it mean date of manifestation, and by whom, or does it mean date of disability? There has been no policy determination made. The Board issued a decision last Friday in the Dunn case, where a majority of the Board found that it was date of last exposure that is the time of injury.

The last part of the act that is sadly deficient is the identification of responsible operators. That is a big, big problem, because you have to interpret the Cardillo last employer rule. Does the Cardillo last employer rule mean the last employer of the act, or the last employer which might be an employer covered by State compensation? We have issued a decision in the Black case, in which I dissented, which found that the Cardillo rule is limited to Longshore Act employers.

So I think this is also an issue with which the committee needs to concern itself. The facts in Black were that Mr. Black was employed by Todd Shipbuilding from 1942 to 1945 that he was exposed to asbestos. From 1951 to 1977, he was employed by Boeing Aircraft, which is covered by the State of Washington act. Mr. Black tried to bypass 26 years of employment with Boeing Aircraft to go back and get Todd Shipbuilding. This issue had to be decided by a majority of the Board. I think that the Board and the courts should not have the responsibility of deciding these types of cases. That should be a policy determination made either by the Congress or by the States.

One last point. I would like to see an effort by the committee and the Congress to try to solve some of these occupational disease problems medically. There is a lady in the hearing room today, Dr. Ariel Hollingshead, who is a scientist from George Washington University. She has worked in cancer for years. She has a serum for use. She is looking for shipyard workers exposed to asbestos who smoke cigarettes. She thinks that her serum can be used like a smallpox vaccination and will keep the employee from ever getting lung cancer. I would like to see this committee and the Congress assist her and other scientists in this field, because if the disease is eliminated, then it is obvious the costs are going to come down.

Senator NICKLES. Judge, I have 6 minutes left for the rollcall, so I will have to scoot. I very much appreciate your interest, your detailed statement, which I look forward to reading.

Did you mention the need for medical standards and what not in your statement?

Judge SMITH. I did, to a point, but I did not elaborate on that. One thing that I might mention. I disagree with what I have heard about who is to pick the impartial medical examiners. It should not be the claimant, and it should not be the employer. The Secretary of Labor should appoint a blue ribbon panel of Board-certified physicians in their specialty and they in turn could select impartial panels around the country. I do not think any doctor should be named an impartial examiner unless he or she is Board-certified in their specialty because if you have the best qualified physicians available, and they are truly independent, hopefully, the evidence that they give will be objective and will assist the adjudicatory branches in making a fair judgment in these cases.

[The prepared statement of Judge Smith follows:]

STATEMENT OF SAMUEL J. SMITH

Chief, Administrative Appeals Judge, Benefits Review Board
United States Department of Labor

Before

The Subcommittee on Labor
of the Senate Committee on Labor and Human Resources

re

S. 1182, Proposed Amendments to
The Longshoremen's and Harbor Workers' Compensation Act

TABLE OF CONTENTS

Page

Introduction 3

Jurisdiction 5

Compensability - In General 16

Nature and Extent of Disability 18

Compensation - Death Benefits 24

Medical Benefits 27

Section 8(f) 30

Settlements 31

Sections 12, 14, and 30 33

Section 33 37

Occupational Disease 41

Widow/Widower 44

Claims Procedure 44

Benefits Review Board 46

Statement of Samuel J. Smith
Chief Administrative Appeals Judge, Benefits Reivew Board
United States Department of Labor

Mr. Chairman and members of the Committee, my name is Samuel J. Smith, I am the Chief Administrative Appeals Judge of the Benefits Review Board, United States Department of Labor, until Friday of this week, June 19, 1981. [1] Thereafter, I will become a practicing attorney in the law firm of Parrish, Moriarty & Smith of San Francisco, California. I appreciate your kind invitation to visit with the Committee here today and to discuss S. 1182. I appear before the Committee in my present capacity and the views expressed will be those of a country lawyer, from West Virginia, who has had both the honor and privilege the past seven years to serve my country as an Administrative Law Judge and as the Chief Administrative Appeals Judge of the Benefits Review Board.

INTRODUCTION

At the outset, one must recognize that the Longshoremen's and Harbor Workers' Compensation Act (hereinafter, the Act) is not a model of legislative clarity. The Act, including the 1972 amendments, has been created with a very wide brush. Moreover, the legislative history has provided only minimal guidance to the Administrative Law Judges, Benefits Review Board, and

---

[1] I wish to express my appreciation and gratitude to Brian Meyers, Acting Senior Board Attorney and Sydnee Schwartz, Special Assistant, for their most able assistance in preparing this statement.

United States Courts of Appeal, who have fielded the hot grounders. Furthermore, the United States Department of Labor during the eight odd years since passage of the 1972 amendments to the Act has in my view failed to properly implement the Act by appropriate regulations and timely internal policies.

During the past several years I have observed and identified a number of problem areas within the Act, some of which will require legislative actions. However, there are numerous other problems that can and should be corrected by the Department of Labor through regulation and internal policy.

Although there are definite problems with the Act, I would hasten to point out that despite these problems there has not been a deluge of litigation to date. Presently, ninety-six percent (96%) of all Longshore Act claims are settled at the Deputy Commissioner level. About four percent (4%) reach the Office of Administrative Law Judges, of which only about half of the four percent (4%) reach actual trial. The Benefits Review Board receives about one percent (1%) of the claims filed under the Act, while the United States Courts of Appeal receive one-tenth of one percent (0.1%). Thus, compared to State Compensation systems you will find that the Longshore Act ranks very low in the litigation ratio of total claims filed to actual trials. However, this rosy picture is likely to change in the future due to reasons which I will set forth more fully herein.

The introduction to S. 1182 reads as follows: To amend the Longshoremen's and Harbor Workers' Compensation Act, to revise the manner of computing the benefits provided under such Act, to provide the certification of physicians eligible to provide medical care to workers covered by such Act, to provide for an attorney to serve as the representative of the Special Fund established under such Act, to establish a Benefits Review Board the members which are appointed by the President, to establish an advisory committee to evaluate the manner in which the provisions of the Act are carried out, and for other purposes.

This modest introduction masks the enormity of the bill. This bill, in its current form, negates a substantial number of the major court and Board decisions following the 1972 Amendments to the Act either by deletion of presently existing language or amendment. Moreover, it radically changes some of the fundamental concepts that have been in the Act since its inception.

In order to provide the Committee with a clear perspective, it seems appropriate to contrast the law as it presently stands with the changes proposed in S. 1182. In addition, I will comment on matters that would appear to need clarification, as well as some critical issues that appear to have been overlooked.

Jurisdiction

In 1972, the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act was greatly expanded. The reason for this expansion is well summarized in a decision by the U.S. Court of Appeals for the Second Circuit in a 1976 case under the Act. The Court noted:

> In practical terms the bill was a tradeoff. Stevedores and other employers were pushing for complete abolition of the three-way damage action...which held longshoremen and other harbor workers to be "seamen" entitled to sue the ship for unseaworthiness, ...[then] permitted the shipowner to seek indemnity for any liability thus entailed from an injured worker's employer. This triangle in effect exposed the employer...to an unlimited liability to the employee for damages and to the shipowner for its counsel fees in defending the employee's suit. The unions representing longshoremen and other harbor workers, which for years had been seeking increased benefits under the Act, opposed Congressional repeal of their...status as "seamen" in part on the grounds that the LHWCA's benefits were so low that workers needed the additional protection of the "unseaworthiness" doctrine. The compromise between these positions effected by the 1972 Amendments was this: The...action for unseaworthiness was eliminated, longshoremen in the future could sue the ship only for negligence and employers were immunized from indemnity suits by shipowners. In return, the workers were to secure increased benefits under LHWCA and what is here pertinent, an extension of that statute's coverage. Thus the Senate Committe said that the principal purpose of the Amendments was "to upgrade the benefits, extend coverage to protect additional workers, provide a specified cause of action for damages against third parties, and to promulgate administrative reforms."

Pittson Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 40 (2d Cir. 1976) (citations omitted).

However, in extending the Act's coverage, Congress failed to fully delineate the limits of coverage. A broad situs requirement was set forth which included not only actual navigable waters but also certain adjoining land areas. A status requirement was added to limit coverage only to certain employees injured on a covered situs. The status requirement was, unfortunately, drawn in the vaguest of terms. The legislative history provided minimal guidance in determining which employees Congress intended to be covered. In addition, no regulations interpreting these broad definitions were ever promulgated by the Department of Labor. Needless to say, there has been considerable litigation. It was thus left to the Benefits Review Board and the United States Courts of Appeals to establish the parameters of coverage through the judicial process. As a result of several major Supreme Court decisions as well as numerous decisions by the Courts of Appeals and the Board, the limits of jurisdiction in several major areas have been set. A brief overview of the current state of the law is useful to illustrate this point. 2/

The term "employee" is defined in several different ways. The term includes longshoremen and persons engaged in longshoring operations. Case law has essentially established that those persons injured on a covered situs while engaged in the loading or unloading of materials prior to the materials' transfer to land-based transportation for transhipment are considered longshoremen. See generally P. C. Pfeiffer Co., Inc. v. Ford, 444 U.S. 69 (1979); Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977). Moreover, persons engaged in the maintenance of equipment used in longshoring activities (including the repair of containers and chassis) have been found to meet the status requirement. See, for example, Texports Stevedore Co. v. Winchester, 554 F.2d 245 (5th Cir. 1977), reaff'd 632 F.2d

---

2/ For a more complete discussion, see the Longshore Desk Book, a book of first reference developed by the staff of the Benefits Review Board.

504 (5th Cir. 1980); Bradshaw v. J. A. McCarthy, Inc., 564 F.2d 89 (3d Cir. 1977). These areas are seldom the subjects of litigation at this time.

Under the current statute, the terms "shipbuilder," "shiprepairman" and "shipbreaker" fall under the more general classification of harbor worker. Decisions by the U.S. Courts of Appeals for the Fourth and Fifth Circuits have clearly established that all persons directly involved in the overall fabrication process are covered by the Act if they are injured on a covered situs. Generally, the entire shipyard would be considered to be a covered situs. Coverage is also extended to those persons who maintain or repair equipment essential to the overall fabrication process. See Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (4th Cir. 1978); Ingalls Shipbuilding Corp. v. Morgan, 551 F.2d 61 (5th Cir. 1977); Alabama Dry Dock & Shipbuilding Co. v. Kininess, 554 F.2d 176 (5th Cir. 1977). The Fifth Circuit, reading the status and situs tests quite broadly, has even extended coverage to persons manufacturing component parts at a waterside facility, even though the parts were being shipped elsewhere for actual assembly. Alford v. American Bridge Division, U.S. Steel Corp., 642 F.2d 807 (5th Cir. 1981). The status of persons engaged in the very preliminary steps of shipbuilding remains unclear. A Board decision denying coverage to a claimant engaged in a very preliminary step has been reversed by the Fourth Circuit. White v. Newport News Shipbuilding & Dry Dock Co., 633 F.2d 1070 (4th Cir. 1980).

The Board has also found employees engaged in the production of small boats covered under the Act if the situs requirement was met. Schwabenland v. Sanger Boats, 13 BRBS 22 (1980) (Smith, C. J., dissenting). In finding coverage, the Board has specifically noted the lack of any clear Congressional intent to prohibit coverage.

Ship repair, unlike ship construction, often involves employees working in waterfront shops on maritime and non-martitime projects. Some of the work, however, is performed aboard ship. The Board has noted that the jurisdictional status of such individuals is often dependent on the factual pattern of the case. See, for example, Gentile, Erickson & Rakowski v. Golten Marine Co., 13 BRBS 65 (1981).

As previously noted, "harbor worker" is defined in terms of activities relating to shipbuilding, shipbreaking or ship repair. However, harbor work is not limited to these activities. The Board, taking into consideration the relevant pre-amendment law, has defined "harbor worker" as including "at least those persons involved in the construction, repair, alteration or maintenance of harbor facilities (including docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships)." Stewart v. Brown & Root, Inc., 7 BRBS 356 (1978), aff'd sub nom. Brown & Root, Inc. v. Joyner, 607 F.2d 1087 (1979), cert. denied, 100 S.Ct. 2960 (1980). Applying this definition, the Board has found coverage for persons, such as pile butts, who are engaged in the construction of harbor facilities relating to navigation and commerce. Hed v. Duncanson-

Harrelson Co., 7 BRBS 821 (1978), aff'd sub nom. Duncanson-Harrelson Co. v. Director, OWCP, 13 BRBS 308, Nos. 78-1973, 79-7572 (9th Cir. May 8, 1980); Nold v. Guy F. Atkinson Co., 9 BRBS 620 (1979).

The remaining term, "a person engaged in maritime employment," is one obviously capable of a broad interpretation. However, the Board looking to the overall purpose and structure of the Act has limited this category to those persons in jobs that "have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters...." Sedmak v. Perini North River Assoc., 9 BRBS 378 (1978), aff'd sub nom. Fusco v. Perini North River Assoc., 622 F.2d 1111 (1980). Applying this definition, the Board has denied coverage to persons building a sewage disposal plant in a harbor as well as persons engaged in bridge building. The Board has also denied coverage to security guards. See Arbeeny v. McRoberts Protective Agency, 12 BRBS 435 (1980), and Conlon v. McRoberts Protective Agency, 12 BRBS 473 (1980). The Second Circuit has disagreed with these last holdings, reversing the Board's decisions in these cases. See Arbeeny and Director, OWCP v. McRoberts Protective Agency, 13 BRBS 177, No. 79-4159 (2d Cir. March 9, 1981). The proposed legislation does not cover security personnel.

It should also be pointed out that the Courts and the Board, applying these various definitions in the jurisdiction section, have also denied coverage to persons engaged in clerical and custodial services. See, for example, Dravo Corp. v. Banks, 567

F.2d 593 (3d Cir. 1977); Maher Terminals, Inc. v. Farrell, 548 F.2d 476 (3d Cir. 1977).

There does remain several areas where the law is somewhat unsettled. For instance, there are situations where only a portion of an individual's time is spent in an activity covered by the Act. This situation occurs most often where ship repair operations are performed, where a manufacturing business conducts its own maritime shipping operations or where truck drivers actually aid in the accomplishment of covered activities for a short period of time. See Cuellar v. Garvey Grain Co., 11 BRBS 441 (1979), aff'd sub nom. Garvey Grain Co. v. Director, OWCP, 12 BRBS 821, No. 79-2498 (4th Cir. January 5, 1981); McNeil v. Prolerized New England Co., 11 BRBS 576 (1979), aff'd sub nom. Prolerized New England Co. v. Benefits Review Board, 637 F.2d 30 (1st Cir. 1980). The Board, while noting that coverage should not be denied on the activity at the moment of injury, has similarly noted that incidental activities should not grant coverage. See the Board's decision in Boudloche v. Howard Trucking Co., 11 BRBS 687 (1979), and Howard v. Rebel Well Service, 11 BRBS 568 (1979). The Circuits have disagreed. The Board's decisions in Boudloche and Howard have been reversed. See also Odom Construction Co. v. U.S. Department of Labor and Maze, 622 F.2d 110 (1980); Warren Bros. v. Nelson, 12 BRBS 714, No. 78-3407 (6th Cir. Dec. 15, 1980).

S. 1182 radically changes much of this law. S. 1182 deletes the separate status and situs requirements. Instead, it defines an employee's status in terms of both his job activity and his location. These definitions, while much more clear, are extremely limiting.

The current bill limits a longshoreman's coverage strictly to those activities taking place aboard ship or immediately dockside. Moreover, covered activities dockside extend only to a point of rest. The term "point of rest" is tied in with whether the cargo being moved is inbound or outbound, thus creating the spectre of litigation over the direction in which materials were moving. Moreover, coverage would appear to become dependent on how an employer arranges its shipping operation, or how the port is physically structured. Accordingly, coverage may well fluctuate from port to port. Stuffing and stripping activities in warehouses would no longer be covered. Similarly, truck or railcar loading and unloading operations are not covered. Also, persons engaged in the maintenance and repair of longshoring equipment would not be covered. These repair activities may not be covered even if they are performed aboard ship.

As concerns activities relating to shipbuilding, shipbreaking and ship repair, the proposed bill returns coverage to essentially the same state in which it existed prior to the 1972 amendments; that is, only activities taking place aboard ship or on a floating dry dock are covered. This, of course, raises the problem of persons walking in and out of coverage during the course of a day, an issue addressed and sought to be remedied in the 1972 amendments. S. Rep. No. 92-1125, 92d Cong., 2d Sess., 2-13 (1972) (S. Rep.); see Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977).

Persons engaged in the construction of vessels under sixty-five feet are also excluded from coverage if covered under a state act. This provision negates the Board's Schwabenland decision.

The term harbor worker is considerably narrowed. A harbor worker is defined as a "person engaged in the performance of services on or for a vessel while such a person is on navigable waters other than any person covered by a State Workers' Compensation Law." Exactly which persons would fit into this category is unclear. It would not appear to pertain to those persons covered under the present definition of a harbor worker, notably those persons engaged in constructing harbor facilities relating to navigation and maritime commerce. The status of these persons, especially if injured on navigable waters, remains unclear under the proposed legislation.

The Supreme Court has recognized the validity of concurrent state and federal jurisdiction for land-based employees. Sun Ship, Inc. v. Commonwealth of Pennsylvania, 100 S.Ct 2432 (1980). However, the long established concept that state law cannot extend to certain maritime activities would appear to remain in effect. See generally Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Washington v. Dawson & Co., 264 U.S. 219 (1924). Accordingly, certain individuals would be left without a compensation remedy. Alternatively, a return to a twilight zone of coverage would have to be called for. See Davis v. Department of Labor and Industry of Washington, 317 U.S. 249 (1942). In a related matter, the category of persons engaged in maritime employment has been deleted, tnereby eliminating any catch-all category. The statute also codifies current case law concerning the exclusion of administrative or clerical workers.

It is not clear if the present bill effectively deals with the problem of whether coverage should be granted to a person who spends only part of his time working in covered activities. The definition of an employee includes a "primary duties" test, although the word "primary" is subject to differing interpretations.

I note the provision in Section 2(3)(A) that an employee meet the status definition "when the injury resulting in [his] disability or death occurred." This raises the additional question of whether the "moment of injury" test is applicable. The language may be interpreted as suggesting that an employee's activities at the moment of injury may be used to confer coverage. As previously mentioned, the Board has rejected the use of the "moment of injury" test to confer coverage. Boudloche, supra; Howard, supra. On the other hand, the language could be read as denying coverage if at the moment of injury, a claimant was not engaged in a covered work activity. Such an interpretation of the current statute has been rejected by the Supreme Court in Caputo, supra.

The current bill also incorporates language long established in the Act which excludes a member of a crew from coverage under the Act. However, it should be pointed out that the term "member of a crew" is subject to varying legal interpretations. The case law developed under the Jones Act gives an extremely broad definition which clearly conflicts with the definition developed under the Longhshore Act. Compare Longmire v. Sea-Drilling Corp., 610 F.2d 1342 (5th Cir. 1980) with Craig v. American Dredging Co., 10 BRBS 1014 (1979), aff'd, No. 79-4183 (2d Cir. Feb. 26, 1980). The definition under the Longshore Act takes into consideration the fact that an exception should be construed more narrowly than the broad definition provided by the Jones Act.

It is not uncommon to find Jones Act cases where an employee is found to be a member of a crew for Jones Act purposes, and who would also be covered under the Longshore Act. Thus, for such an employee, where negligence is involved, he will maintain that he is a Jones Act seaman. If negligence does not exist, he will maintain that he is entitled to Longshore Act coverage. There needs to be a single test to determine Jones Act vs. Longshore Act coverage.

By way of summary, if the Committee believes that administrative law judge, Board and United States Court of Appeals decisions have covered employees whom the Congress did not intend to cover, then I would suggest that you provide coverage for those which you intend to be covered by re-examining the definitions: "maritime employment"; "longshoremen"; "harbor-worker"; "ship repairman"; "shipbuilder"; "ship-breaker"; "member of a crew"; "other persons engaged in longshoring operations"; and "other adjoining area." Finally, by way of caution the Committee should take great care with respect to jurisdiction in shipyards, because too drastic a limitation in jurisdiction may well result in a myriad of occupational disease suits against employers.

Compensability -- In General

The Act as currently structured contains a presumption of compensability. Much case law has developed over the parameters of this presumption. Section 20 of the Act currently provides that in the absence of substantial evidence to the contrary, it shall be presumed that a claim comes within the provisions of the Act, that sufficient notice of claim has been given, that an injury was not occasioned solely by the intoxication of the employee, and that the injury was not occasioned by the willful intent of the injured employee to injure or kill himself or another. These presumptions correlate with other language in other sections of the Act. These other sections provide that the claim will be denied if the injury is caused solely by intoxication or by willful intent to injure. Also, a claim must be timely filed and timely notice of injury must be given. Moreover, causal connection between a work accident and a physical condition must be established. The presumptions which apply to these issues are based in the humanitarian purpose of the Act. The presumptions aid claimant in establishing his claim. However, once substantial evidence is introduced by employer, the presumption falls from the case. Del Vecchio v. Bowers, 296 U.S. 280 (1935).

The Board has sought in recent years to clarify the parameters of the presumption, denying its applicability in cases involving nature and extent of disability, medicals, status as a widow or widower, and jurisdiction. Brocato v. Universal Maritime Service Corp., 9 BRBS 1073 (1978); Maryland Shipbuilding & Dry Dock Co. v. Jenkins, 594 F.2d 404, (4th Cir. 1979); Meister v. Ranch Restaurant, 8 BRBS 185 (1978); Sedmak v. Perini North River Associates, 9 BRBS 378 (1978), aff'd 622 F.2d 1111 (2d Cir. 1980). Moreover, the Board has held that a claimant must establish his physical condition and a work accident or working conditions that allegedly led to this physical condition without benefit of the presumption. Kelaita v. Triple A Machine Shop, BRB No. 78-576 (March 13, 1981). Only once these elements are established will causality between the physical condition and the employment be presumed in the absence of substantial evidence to the contrary.

Certainly the broad language of the presumption needs clarifying. Perhaps, rather than simply revoking the entire provision, the bill could incorporate relevant Board case law which places the presumption in a proper balance. The presumption as to timely notice of a claim certainly needs clarifying. The Board and the courts are in fundamental disagreement as to whether it applies to Section 12, Section 13, or both. Peterson v. WMATA, BRB No. 78-610 (June 11, 1981). As concerns the intoxication defense, the harshness of the presumption would be greatly tempered by the deletion of the word "solely" in the Section 3(b) exclusion. The word "solely," can be read as nearly requiring death from drink. The present legislation does make such a deletion. In short, while the Section 20 presumption may have been read too broadly in the past, its deletion may work tremendous injustice.

An injustice sometimes perpetrated on employers involves those instances where a claimant lies on his job application as to prior physical conditions. If the later injury is occasioned by this prior condition, or combines with this prior condition, an employer becomes liable for the entire compensation burden. Section 3(c) of the proposed legislation corrects this potential for abuse by holding that the resultant condition is non-compensable. I also note the provision in Section 31 that provides for a fine or imprisonment for any person who willfully makes a false or misleading statement or representation for purpose of obtaining a benefit or payment under the Act.

Nature and Extent of Disability

Currently, where total disability is alleged, it is claimant's burden to show that his condition prevents him from returning to his former employment. Hunigman v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 141 (1978). Once this is demonstrated, it is employer's burden to demonstrate that suitable alternate employment opportunities exist for claimant in the open market. American Stevedores, Inc. v. Salzano, 538 F.2d 933, 4 BRBS 195 (2d Cir. 1976); Diamond M Drilling Co. v. Marshall, 577 F.2d 1003, 8 BRBS 658 (5th Cir. 1978). Employer does not have to find a job for claimant. Rather, the burden can be met by means of testimony of vocational rehabilitation experts. Pilkington v. Sun Shipbuilding & Dry Dock Co., 9 BRBS 473 (1978). The Fourth Circuit has specifically noted that to require claimant to show that he is unable to obtain other empoyment is to require him to prove a negative. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP, 592 F.2d 762, 10 BRBS 81 (4th Cir. 1979). The proposed legislation eliminates the shifting burden test apparently requiring claimant to show both that he is able to return to his former job and that he cannot obtain another job. Compensation for permanent total disability is to be reduced by any social security benefits received. No such provision exists in the present legislation.

The current bill also holds the temporary total disability shall not be paid past retirement. Retirement age is defined in terms of when the general work force in the area retires.

The legislation corrects a problem pointed out in my dissenting opinion in Mendez v. Bernuth Shipping, Inc., 11 BRBS 21 (1979). Where a person has been rendered unemployable, yet is capable of rehabilitation, the proposed legislation requires that claimant submit to a vocational rehabilitation program. This change is long overdue. However, part of the language concerning vocational rehabilitation causes problems. The bill provides that a condition shall be considered temporary while vocational rehabilitation is proceeding. However, case law defines the words permanent and temporary in terms of the medical state of the condition. See Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968); McCray v. Ceco Steel Co., 5 BRBS 537 (1977). It would appear that for purposes of vocational rehabilitation, the term is being defined in a purely economic sense. Moreover, it is not clear exactly who will determine if a refusal to undergo rehabilitation is unreasonable, whether such a determination is reviewable, and where any review would be sought.

The current Act provides for two different kinds of awards for partial disability -- one presumes a certain amount of economic loss if the injury is to a particular member listed under a schedule, the other requires that a loss of wage earning capacity be demonstrated. The Supreme Court has recently made it clear that an award of partial disability for an injury falling under the schedule can only be compensated under the schedule. Potomac Electric Power Co. v. Director, OWCP, 101 S.Ct. 509 (1980). The Board has noted that no set method is provided in the statute for determining the extent of physical loss under the schedule. The lack of such a provision, particularly in the area of hearing loss, has engendered much litigation and confusion. See the discussion in Shelton v. Washington Post Co., 7 BRBS 54 (1977).

The current bill does not provide specific guidelines for determining degree of the physical loss in most scheduled injuries. However, it does set forth a detailed scheme for hearing loss claims. Notable among its provisions are its setting forth of testing standards, its provision for no compensation for loss of hearing ability for frequency tones above 2000 cycles per second, its setting of a distinct method for determining compensable hearing loss, and its formula for apportioning out for hearing losses generally incurred due to aging. It also provides that a claim can only be filed until two months after termination of employment. This last provision essentially means that compensation will become due only after retirement or job transfer. The legislation also provides that an employer who can show a pre-existing degree of hearing loss will not have to compensate claimant for that loss. It also provides that an employer can implead other prior employers. These prior employers as a general rule would be responsible for equal parts of the compensation. It is unclear if only employers covered under the Act would be held responsible. The bill also provides that for employer to be liable for compensation, the claimant must have been employed for at least 90 days. This is in effect a de minimis rule, which has distinct ramifications for the last employer rule. See Travelers Insurance Co. v. Cardillo, 225 F.2d 137 (2d Cir. 1955); Whitlock v. Lockheed Shipbuilding & Construction Co., 12 BRBS 91 (1980).

It should also be noted that another injury is added to the schedule -- that of the spine in absence of a herniated or ruptured disc. Given the sometimes difficult task of diagnosing these conditions, and the often far reaching economic loss of a back condition, one must wonder whether the spine belongs under the schedule.

Another far reaching change occurs in the area of partial awards falling outside the schedule. Currently, compensation for a partial disability is based on the difference between an employee's average weekly wage at time of injury and the wage earning capacity thereafter. Wage-earning capacity is defined in terms of wages post-injury unless it is determined the wages are not truly representative in light of various factors including the nature of the injury and its effect on future employment. Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649 (1978). The Board has noted that the present statutory scheme is inadequate. The more representative comparison would be to determine the amount claimant would have earned had he continued in the job in which he was injured and the amount he is now capable of earning. The Third Circuit has specifically called for such a comparison. McCabe v. Sun Shipbuilding & Dry Dock Co., No. 78-1087, 10 BRBS 614 (1979).

Moreover, under the present statute, it has been recognized that wages in this day and age will often equal or surpass earnings at time of injury simply because of inflation and cost of living increases. These increases will not always really reflect actual post-injury wage earning ability. Accordingly, the board has required that post-injury earnings be adjusted to their level at time of injury so as to try to negate the effect of inflation. Bethard v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 691 (1981). Moreover, the short statute of limitations sometimes has required a minimal award in some cases lest the claimant find himself time barred, before the full effect of his injury is known. Hughes v. Litton Systems, Inc., 6 BRBS 301 (1977).

The current bill retains the worst features of the present Act. In the process, it in effect will negate most partial disability awards. The proposed legislation does not consider a claimant's actual loss of wages or take into consideration the future effect of the injury. Rather, it simply provides that once post-injury earnings exceed the average weekly wage at time of injury, no compensation for partial disability is due. Post-injury earnings will obviously surpass earnings at time of injury in many cases due to general wage increases. The bill does not call for detailing claimant's actual loss in earning potential. The bill also provides that sheltered employment constitutes actual earnings. One must question if an employer can place a claimant in sheltered employment where he is earning in excess of his average weekly wage at time of injury and then terminate any compensation inasmuch as there is no obvious economic loss. If the claimant is then discharged following the running of the statute, claimant would in effect be without any further 8(c)(21) or 8(e) remedy despite his physical condition or degree of economic loss. Moreover, the statute provides termination of compensation not upon deputy commissioner or administrative law judge action as is presently required, but upon employer's unilateral action. This unilateral action stands if not disaproved by the deputy commissioner within 30 days. There is a very real danger of implicit approval being obtained simply by swamping the deputy commissioner's office. One must question if the deputy commissioner has adequate resources to handle these procedures so as to give full consideration to these matters. The proposed bill does, however, provide for an appeal to the Board by any party concerning the suspension proceeding.

The bill also provides that 8(c)(21) awards terminate upon general retirement age or upon death, as well as providing for a maximum payment for non-schedule permanent partial disability. No maximum currently exists in the Act as to permanent partial disability.

Compensation -- Death Benefits

Any benefits for economic loss are based on a claimant's wages at time of injury. The statutory scheme, as it currently stands, provides a method for determining an average weekly wage which is essentially unworkable. Sections 10(a) and 10(b) are based on the outmoded concept that a person is either a five-day or six-day worker and fails to adequately deal with the concepts of overtime and fringe benefits. Consequently, the vast majority of cases end up in Section 10(c), which gives the fact finder a wide range of discretion in establishing an average weekly wage. These provisions are of little aid to an employer who must determine at the outset the average wekly wage on which compensation is to be based.

The proposed legislation greatly simplifies the determination as to average weekly wage, tying term wages in with the Internal Revenue Service Code. This definition would seem to preclude inclusion of some fringe benefits such as employer contributions to retirement and hospitalization plans. Current Board case law prohibits inclusion of these benefits. Freer v. Duncanson-Harrelson Co., 9 BRBS 888 (1979). It further provides that if a claimant works substantially the whole of the year in the same employment for the same or another employer, his average weekly wage shall be one fifty-second part of his total wages earned in such employment. First of all, it is not clear what constitutes substantially the whole of the year. This is frequently a subject of litigation. It can obviously be less than 52 weeks. Moreover, if the statute calls for a 52-week divisor, and time has been lost due to illness or other reasons, and no wages are earned during this period, claimant's average weekly wage will be lower because of the 52-week divisor. This sum may be lower than that provided by the current statutory scheme under Section 10(a). If the employment at the time of injury was of recent origin and the employee worked substantially the whole of the year in other employment, the legislation proposes that his earnings be one fifty-second part of the earnings during such year. However, the average weekly wage shall not exceed one fifty-second part of the average total wages of employees in the same employment as worked at the time of injury. This scheme suffers from the same problems as mentioned earlier. In addition, if an employee has transferred to a higher paying job, his average weekly wage will not fully reflect this change in economic status. Essentially the proposed legislation insures that if you have a higher paying job prior to your injury, you will be limited to the new lower paying job, but the converse will not be true. If a claimant did not work substantially the whole of the year prior to an injury in any job, his earnings shall be the sum total earned divided by the number of weeks worked. This is clearly the easiest method. However, once again an employee's wages cannot exceed those of similarly situated employees in the job at the time of injury. There is no provision for taking future factors into consideration unlike the current statute. See Tri-State Terminals Inc. v. Jesse, 596 F.2d 752 (7th Cir. 1979).

Under the current statute, compensation for total disability and the schedule is based on 66 2/3 percent of this average weekly wage. The new legislation changes this to base compensation on the individual rather than the group. It provides that the average weekly wage is to be reduced by amounts the individual would normally have withheld for state and local taxes. This results in a figure known as claimant's spendable earning. Compensation is then 80 percent of these spendable earnings. Apparently partial awards under Section 8(c)(21) and Section 8(e) are still based on 66 2/3 percent of the difference between average weekly wage at the time of injury and post-injury wage earning capacity. However, they also are apparently subject to the maximums established under Section 6(b)(1). Section 6(b)(1) in the new legislation provides that compensation _and death benefits_ shall not exceed 200 percent of the national average weekly wage. Currently death benefits have no such limitation. _Director, OWCP v. Rasmussen_, 440 U.S. 29, 9 BRBS 954 (1979). However the current legislation would provide such a limitation. Relatedly, death benefits under current law can reach the actual average weekly wage, exceeding the applicable percentage. _Dunn v. Equitable Equipment Co._, 8 BRBS 18 (1978). The proposed legislation would make these benefits subject to the 200 percent maximum or the actual average weekly wage, whichever is less. The 1972 Amendments also provided for death benefits for the family of an employee claimant who was permanently totally disabled or permanently partially disabled at time of death. _Puig v. Standard Dredging Corp._, 599 F.2d 467, 10 BRBS 531 (1st Cir. 1979). The current legislation removes these provisions.

As previously mentioned, compensation for non-scheduled permanent partial disability and temporary total disability is to cease as of the general retirement age.

Currently payments for permanent total disability or death are subject to an annual adjustment based on any increase in the national average weekly wage. The proposed legislation provides for such an increase but would limit it to this increase in the national average weekly wage or three percent, whichever is the lesser. Accordingly, the effects of inflation will obviously be felt.

There also appears to be another provision other than the 200 percent of national average weekly wage maximum. Apparently, compensation will be reduced by income from outside sources, such as unemployment benefits, certain retirement plans and other workers compensation benefits. The scheme guarantees that combined income shall never exceed 80 percent of spendable earnings. It is unclear what happens if these other benefits are also offset as a matter of law, Section 10(m)(2) not being a model of clarity.

Medical Benefits

At present a claimant is free to choose his own treating physician from among those physicians approved by the Secretary. This list is essentially all inclusive. The treating physician must file a report with the employer and the deputy commissioner within 10 days to obtain payment. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978). Moreover, any change in physicians must be approved by the employer. Claimant can also request that the employer provide treatment. In an emergency situation, the employer is to provide treatment on its own initiative. The failure to file this report can be excused by the administrative law judge.

This system has produced abuses. However, the proposed system essentially represents a return to the system that existed prior to the 1972 Amendments, a system not without its faults. The proposed legislation provides for physicians to be nominated by employers and selected by the deputy commissioner. It is unclear why no other input on panel selection is sought. The bill contains no requirement that the physicians on the panel be certified in their specialty, only that they be competent and impartial. This omission raises again the spectre of inaccurate diagnoses. In addition, it is unclear why the appointment of these panels is the function of the deputy commissioner rather than the Secretary of Labor.

The legislation also provides that if a non-posted physician is selected in an emergency, the physician can continue to provide services if the deputy commissioner approves. As now, the attending physician must file a report within 10 days to obtain payment. This time frame is unreasonably short. Strict rules for referral of the employee to a specialist are provided. The specialist must file a report within 21 days. Failure to file relieves employer from liability for the medical expense. The legislation provides no excuse for lack of timely filing, seemingly a harsh omission.

Currently, the deputy commissioner has the authority to suspend compensation upon an unreasonable refusal to undergo medical or surgical treatment unless the circumstances justified the refusal. Hrycyk v. Bath Iron Works Corp., 8 BRBS 300 (1978). The idea behind suspension of compensation would appear to be to encourage treatment that would lead to minimized compensation liability. The Act also provides for suspension of compensation proceedings for a refusal to submit to an examination. Grbic v. Northeast Stevedore Co., 13 BRBS 282 (1981). The proposed legislation provides not only for the suspension of compensation but of compensation proceedings upon an unreasonable refusal to submit to surgery or treatment. This suspension provision appears not to be for the purpose of allowing the thorough evaluation of the claimant as the examination provision does but to give added emphasis to treatment even prior to resolution of the claim. Also a single standard of reasonableness concerning the refusal is provided.

The proposed legislation further provides that an employer can require that a claimant be examined by an independent examiner who is a specialist. This examiner shall submit a report under AMA Guidelines and provide other relevant criteria. It is unclear what role the AMA Guidelines are to play, given no corresponding general statutory provision for acceptance of AMA Guidelines. The failure to attend such an examination can result in a suspension of compensation. Currently only the deputy commissioner can order such an examination by an impartial examiner. He also has the sole authority to suspend compensation proceedings. One must question the lack of procedural guidelines governing the suspension by employer.

The proposed legislation also provides for the deputy commissioner ordering independent examination and for suspending compensation for refusal to attend such an independent examination. It is unclear if this provision relates only to an examination by an independent physician examining for Section 8(f) purposes.

The legislation also gives the deputy commissioner the authority to determine the necessity, character and sufficiency of the medical care rendered and to determine whether the fees charged are reasonable by local standards. One must question the deputy commissioner's ability to handle this volume of work given his limited resources and his other responsibilities under the statute.

Section 8(f)

As the Act is currently structured, prior to a grant of Section 8(f) relief, it must be determined if the claimant had a pre-existing disability, whether this disability was manifest to employer and whether this pre-existing disability contributed to the ultimate disability. American Mutual Insurance Co. v. Jones, 426 F.2d 1263 (D.C. Cir. 1970). While recent decisions reflect a trend towards a liberal construction in favor of employer, Director, OWCP v. Universal Terminal & Stevedoring Corp., 575 F.2d 452, 8 BRBS 498 (3rd Cir. 1978), these requirements nonetheless are often a subject for litigation.

As earlier noted, the proposed legislation calls for an independent medical examiner to determine if there was a pre-existing disability and whether this disability contributed to the ultimate disability. This provision in effect turns what is now primarily a legal question involving disputed facts as to employer knowledge, what constitutes a disability, and contribution, into a medical question. Any manifest requirement is deleted. It is unclear how an impartial examiner could determine whether there was a pre-existing condition in all cases. Moreover, it is unclear if his findings are binding. The statute does provide that a representative of the Special Fund is to be appointed by the Secretary of Labor upon the recommendations of employers and insurance carriers. This individual is to be given notice of an application for apportionment. Thus, apparently, this representative is authorized to defend against the request. It is unclear how the representative would be expected to actively defend a claim if an independent examiner had found the criteria met. However, the statute does not preclude such a defense effort. The bill also allows the representative to hire professional and clerical staff to carry out these duties. One is left to wonder whether it might be more efficient and possibly less expensive in the long run to allow the representative to hire outside regional counsel to do this type of work.

Settlements

In recent years, many cases have been appealed to the Board regarding settlement. The Board has held that settlements are not only the province of the deputy commissioner but given certain guidelines also the province of the administrative law judge. Clefstad v. Perini North River Associates, 9 BRBS 217 (1978). In a related case, the Board and courts have noted that death benefits cannot be settled and that only the Secretary of Labor has the authority to approve the settlement of medicals. Ladner v. Marine Concrete, 12 BRBS 742 (1980), aff'd, Marine Concrete v. Director, OWCP, No. 80-3882 (5th Cir. 1981).

The proposed legislation does not provide for the settlement approval by administrative law judge. The basis for precluding the administrative law judge from settlement proceedings is unclear. It would appear to be a shortcoming. While the legislation provides for settlement for death benefits, apparently the provision that only the Secretary of Labor can settle medicals remains unchanged. Once again, the statute provides for deputy commissioner action within 30 days upon receipt of a request for settlement or the action will be deemed approved. Given the present resources of the Department, this does not appear at all practical. Moreover, the deputy commissioner's scope of review is severely limited. Under the present statute and case law, the settlement must be in claimant's best interest. Under the proposed legislation, it is to be disapproved only if grossly inadequate or procured by duress. This legislation presumes the parties' attorneys will only settle if it is in their clients' best interests. This is a major assumption.

The bill also provides a new procedure for the commutation of settlement benefits. Presently only an award can be commuted. A settlement which of course represents a compromise is not presently the subject of commutation.

Neither the current Act nor the proposed legislation contains a provision for withdrawal of a claim. Such a provision currently only exists by regulation. A statutory provision may be useful. Also, no provisions are set forth for settling attorney's fees. This issue is often brought to the Board's attention. Carswell v. Wills Trucking, BRB No. 79-509 (March 16, 1981).

Sections 12, 14 & 30

At present, the statute provides that the claimant must give notice of injury to employer and the deputy commissioner within 30 days of the date he becomes aware or should have become aware of the relationship between his employment and his injury. If he does not, the claim, whatever its merits, will be barred. However, failure to give notice is excused if employer had knowledge of the injury and employer was not prejudiced by lack of formal notice. There has been a great deal of controversy as to the degree of knowledge employer must have. The Board and some Courts of Appeals have required less than actual knowledge that there has been a work related injury. The present legislation calls for actual knowledge. It is unclear if the legislation merely codifies case law such as the Third Circuit's decision in Sun Shipbuilding & Dry Dock Co. v. Walker, 590 F.2d 73, 9 BRBS 399 (3rd Cir. 1978) or if it imposes an even stricter standard. Moreover, it is unclear if the proposed legislation strikes a requirement that the timeliness issue be raised at the first hearing of the claim and the provision that failure to give timely notice can be excused if some satisfactory reason was provided why notice was not given.

The Board has observed that the knowledge requirement of Section 12(d) interrelates with the various requirements of Sections 30 and 14. Section 30 provides that if an employer has knowledge of an injury and fails to file a report of injury, the statute of limitations under Section 13 does not begin to run. The proposed legislation requires actual knowledge prior to the filing of such a report. Under Section 14, voluntary payments are to begin upon knowledge of injury. The proposed legislation provides for the commencement of voluntary payments only upon actual knowledge of injury. At present, if employer declines to pay any compensation or disputes the amount of compensation, it must controvert within 14 days of knowledge of injury thereby giving claimant notice that a compensation dispute exists. The proposed legislation requires controversion only upon the receipt of a claim thus placing the burden on claimant to, in effect, spur on the payment proceedings.

This legislation further addresses those situations where voluntary payments were commenced but a later dispute arose over compensation. The Courts and the Board have noted that controversion is required once the controversy arises. Universal Terminal & Stevedoring Corp. v. Parker, 587 F.2d 608, 9 BRBS 326 (3rd Cir. 1978). This legislation eliminates that requirement by making controversion solely dependent on the actual filing of a claim.

The Board and the Courts have also addressed themselves to when an additional assessment of compensation under Section 14 cuts off. The Board noted in Oho v. Castle & Cooke Terminals, Ltd., 9 BRBS 989 (1979), that the additional assessment terminates as of the actual date of controversion. The Courts and the Board later refined this rule to provide that termination occurs as of the date of controversion or the date of informal conference whichever is earlier. National Steel & Shipbuilding Co. v. U.S. Department of Labor, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979). The proposed legislation, however, fails to incorporate these decisions into the statutory language.

Presently if an award has been entered, the employer must pay the award within 10 days. If no stay of payments is granted by the Board within this time frame, employer becomes liable for a 20 percent penalty. The proposed legislation makes a major change. First of all, recognizing the absurdity of this 10 day provision, it changes the 10 day period to 15 days from receipt of the order making the award in which to make payment, not 10 days from the date the award is entered as the statute presently requires. It further provides that the check need only be mailed within this period of time. These changes make a great deal of sense. However, the legislation goes much further. It provides for an automatic stay of back benefits if the employer seeks timely review of the award before the Board. Currently, there is, of course, a real problem if a claimant spends his back benefits while the case is on appeal. The employer may be unable to recoup these benefits if the award is eventually overturned.

On the other hand, if the claimant has gone into debt while waiting for an award, it similarly guarantees that he will not have the benefit of any back payments to pay off any debts incurred while the case is on appeal. Perhaps this provision would most equitably apply only in cases involving injuries resulting in a schedule award, or in non-scheduled partial disability cases.

Attorney's Fees

Under the present structure, attorney's fees become the liability of the employer in two situations. If an employee claims compensation and employer actively disputes or fails to pay within 30 days of notice of the claim, employer bears claimant's attorney's fees if claimant is successful. Where an employer voluntarily pays compensation without a claim and claimant seeks additional compensation, and claimant ultimately receives more compensation as a result of litigation before the administrative law judge, employer is similarly liable for the fee. The fee is to be based on the difference in the compensation paid and the amount ultimately gained. The Board and Courts however have held that the fee need not be less than the actual compensation gained. National Steel & Shipbuilding Co. v. U.S. Department of Labor, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979). The Board has noted that to provide otherwise would drive competent counsel from the field. Kelley v. Handcor, Inc., 1 BRBS 319 (1975).

The proposed legislation provides that employer shall bear the cost of an attorney's fee only in the first situation.

This of course leaves open the possibility that a nominal payment could be made to claimant and claimant would have to obtain counsel so as to obtain the amount properly due him. However, claimant would bear that fee inasmuch as employer has met the technical letter of the law.

The proposed legislation also provides that the Board is to approve any fee awarded. Where the fee is for services performed before the deputy commissioner or an administrative law judge, that person would appear to be the more appropriate party to award a fee in the normal course of events.

Section 33

Pursuant to Section 33(a) a claimant injured by the negligence of a third party may sue the third party without sacrificing his rights to compensation under the Act. Acceptance of a compensation award will operate as an assignment of claimant's third party rights unless the claimant commences litigation within six months. Several cases have focussed upon what constitutes acceptance of a compensation award within the meaning of Section 33(b) so as to activate the six-month limitation period for assignment. The courts have not required a formal compensation award. See, e.g., Liberty Mutual Insurance Co. v. Ameta & Co., 564 F.2d 1097 (4th Cir. 1977); Barulec v. Skou, 471 F.Supp. 358 (S.D.N.Y. 1979). There also have been cases in which it has been held that an employee did not automatically relinquish his right to proceed against a third party after the six-month period elapsed. Assignment to the employer under Section 33(b) may not be recognized if it is demonstrated that the employer would not pursue its third-party rights because of a potential conflict of interest. See, e.g., Czaplicki v. The S.S. Hoegh Silvercloud, 351 U.S. 525 (1956). However, the Supreme Court has recently held that under the 1972 Amendments, Section 33(b) is to be strictly construed. Rodriguez v. Compass Shipping Co., 49 U.S.L.W. 4527 (U.S. May 18, 1981) (No. 79-1977). Thus, the Court concluded that three claimants who had delayed pursuing their third-party claims for more than six months were precluded from pursuing these claims. The Court expressly did not reach the question

> ...whether an assignment under Section 33(b) will bar a longshoreman's action if there is specific evidence of a serious conflict of interest Congress could not have foreseen when it enacted and amended Section 33.

49 U.S.L.W. at 4533.

If the employer commences the third-party litigation and wins, the statute provides a distinct plan for distribution under Section 33(e). The employer is entitled to retain amounts equal to its liability for compensation benefits, medicals, legal fees and costs, and one-fifth of any excess remaining after the deduction of these amounts. The employee is entitled to the remainder.

No such plan of distribution exists where a claimant pursues and obtains an award. Case law has provided for distribution where the employee initiates the third party action. Section 33(f) provides that employer may credit the employee's third party recovery against its liability for compensation payments.

This has been interpreted to apply to all past and future medical benefits as well. Rudy v. Dresser Offshore Services, Inc., 8 BRBS 432 (1978).

Controversy has arisen over liability for legal fees. If the third party award is less than the benefits due, the legal expenses incurred by the claimant in securing the third party recovery are to be paid before computing employer's credit. Nacirema Operating Co. v. Oosting, 456 F.2d 956 (4th Cir. 1972), cert. denied 409 U.S. 980 (1972). If the award is greater than the benefits due, the Supreme Court has held that the employer does not have to pay a share of the employee's legal expenses in securing the third party recovery. Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74 (1980).

The statute further provides that an employee must obtain employer's written approval of a third party settlement. If the third party settlement is not approved, the employee waives his rights to compensation under the Act. It should be noted that under a Board holding approved by the Ninth Circuit, the approval of the employer is not required if employer has refused to pay any compensation under the Act. This holding prevents an employer from refusing to pay compensation and refusing to approve the settlement, thereby deliberatly forcing the employee to settle. O'Leary v. Southeast Stevedoring Co., 7 BRBS 144 (1977), aff'd No. 78-1339 (9th Cir. 1980).

Under Section 33(h), when an insurance carrier has assumed payment of compensation, it is subrogated to the employer's Section 33 rights. Ordinarily, this section is straightforward in its application. However, controversy has arisen where the carrier has waived its subrogation rights. The Fifth Circuit Court of Appeals has held that the contractual waiver of Section 33(h) subrogation rights barred the carriers entitlement to a Section 33(f) credit. Capps v. Humble Oil Refining Co., 536 F.2d 80 (5th Cir. 1976), but see Luke v. Petro-Weld, Inc., 619 F.2d 418 (5th Cir. 1980).

The proposed legislation does not address the issue of what constitutes an "acceptance of compensation" under the Section 33(b). However, the legislation does provide a plan for distribution where claimant recovers in a third party action. It also provides that employer's credit be computed before payment of attorney's fees where claimant's recovery is in excess of compensation due. See Section 33(f)(3).

Where the amount recovered is less than compensation due, the attorney's fee question remains. Section 33(f)(1) states only that employer is liable for the excess of compensation over the amount recovered, but does not indicate whether claimant may subtract attorney's fees from the amount recovered. If claimant must pay his attorney's fee in deficiency cases as well as distribution cases (3(f)(3)), the result will be a reduction in claimant's compensation.

The proposed legislation provides for a claimant to obtain employer's approval of a third party compromise even if employer has refused to pay claimant any compensation. As previously noted, this provision could lead to injustice. In regard to Section 33(g), the statute could remedy a problem of this nature by providing for an impartial party, such as the deputy commissioner, to approve the settlement. This would prevent this situation.

Occupational Disease

In my view, the most critical issue facing us today involving the Longshore Act is the rising storm of occupational disease claims which are being filed. The Longshore Act as presently written does not lend itself to easy resolution of occupational disease cases. Parties involved in occupational disease litigation under the Longshore Act often find themselves sailing on uncharted seas. These occupational disease cases present a mixture of medical and legal issues for resolution. Asbestosis cases lead the parade of occupational disease claims being filed under the Longshore Act.

The Longshore Act is deficient in occupational disease cases because (1) the Act is totally lacking in medical criteria and standards; (2) the Act does not provide guidelines for assessing employer liability; and (3) determination of employee benefits is like throwing darts. 3/

Aside from hearing loss cases, the Act makes no atttempt to set forth medical criteria and standards for determining the severity of or even the existence of occupational diseases. I note that the Black Lung Act has voluminous regulations on the matter, in which an attempt is made to correlate the degree of

---

3/ For a more complete analysis, please see my law review article co-authored with Mr. Steven T. Birek entitled Sailing The Uncharted Seas of Asbestos Litigation under the Longshoremen's and Harbor Workers' Compensation Act at 22 Wm. and Mary L. Rev. 177 (Winter 1980).

medical impairment with economic disability. Rather, the current legislation merely provides that:

> entitlement to compensation for disease alleged to be derived in any part from claimant's occupation shall be determined by the application of the substantive workers compensation law of the state in which the last exposure to the disease producing or aggravating stimulus occured.

This language can be construed as merely delegating the thorny question of the compensability of various occupational diseases to the states. If this is the case, the uniformity of the federal act is greatly undermined.

Moreover, with the exception of hearing loss cases, the Act does not address the very real problem of which employer should bear the liability burden. In many cases, a claimant will have been employed with a variety of employers, only some of whom are covered under the Longshore Act. However, when the full effect of the disease is known, the claimant will seek benefits under the Longshore Act rather than pursuing a claim against any employers under the state act. This is the case even where the bulk of the hazardous exposure occurred after claimant left employment with an employer covered by the Act. The Board has held, over my dissent, that the Longshore employer is nonetheless responsible for the payment of benefits. Black v. Todd Shipyards Corp., BRB No. 79-706 (June 12, 1981). The Board majority has concluded that the last employer rule, which would normally place responsibility on the last employer who exposed claimant to injurious stimuli, only applies to employers covered under the Act. Therefore, only the last employer under the Act can be held responsible when claimant files a claim under the Act. I strongly disagree with the result and the reasoning. Clearly, the statute needs to provide for an equitable allocation of the liability burden, thereby prohibiting attempts to place full liability on an employer under the Act simply because the Act may provide a higher benefit level.

In terms of the benefits due under the Act, the current Act presents many problems in the following factual pattern: Where the claimant is last exposed to hazardous substances prior to the 1972 amendments but the disease only appears after 1972, what is to be his average weekly wage? Is it to be the wage at time of his exposure or the wage earned at the time his disease became manifest or disabled him? What is to be his overall compensation rate? Is the claim to be treated as a pre-1972 case or as a post-1972 case?

In Dunn v. Todd Shipyards Corp., BRB No. 78-510 (June 12, 1981), the Board majority held that average weekly wage is to be established as of the date of last exposure to the hazardous stimuli. However, in so holding, the majority noted that the statute was far from clear concerning Congressional intent on the question. The Board majority has further concluded that where all the exposure occurred prior to the 1972 amendments, the claim must be treated as a pre-amendment case even though disability occurred post-amendment. Verderane v. Jacksonville Shipyards, Inc., BRB No. 76-244 (June 12, 1981). These holdings of course result in a claimant receiving a lower compensation rate.

Obviously, there are two strongly competing interests here. A claimant will want his compensation based on the wages he was earning when the full physical ramifications of his disease appear. On the other hand, employer premises its compensation liability on those wages earned while claimant was in its employment, not on wages that may have been earned years later. A sudden imposition of liability based on these higher wages would result in an extraordinary compensation burden, that could prove to be financially disastrous.

The statute should address and attempt to correct these problems.

Widow/Widower

I note this new bill leaves the definition of a widow or widower as it presently stands. The Court of Appeals for the Fifth Circuit has clearly required that widow/widower status be defined in terms of a state's own law. Ryan-Walsh Stevedoring Co. v. Trainer, 601 F.2d 1306 (5th Cir. 1979). This requirement often requires an analysis of a state's own case law -- case law that is generally far from clear. However, the Board's attempt to set a single nationwide standard was reversed by the Fifth Circuit. Obviously a single standard would be much more capable of easy administration. However, any such change would have to be done by statute and not by judicial action.

Claims Procedure

The 1972 amendments to the Act established the following claims procedure: upon receipt of a claim, the deputy commissioner is to make appropriate investigations and attempt to resolve the matter on an informal basis. Regulations promulgated pursuant to the statute call for the deputy commissioner to hold informal conferences and make recommendations concerning the disposition of the claim. The recommendations, if accepted, have the force of an award. If any party disagrees with the recommendation, the case is transferred to the Office of Administrative Law Judges for a formal hearing. The hearing is to be conducted in accordance with the provisions of the Administrative Procedure Act. Any party dissatisfied with the administrative law judge's decision can appeal to the Board. The Board's scope of review is limited to determining whether the administrative law judge's decision is supported by substantial evidence and in accordance with law. In certain instances, the Board will entertain a direct appeal from a deputy commissioner's order or action. Normally, these appeals will involve a strictly legal question or the review of a discretionary act of the deputy commissioner. The Board's power to entertain a direct appeal has been questioned by the U.S. Court of Appeals for the Seventh Circuit. See Pearce v. Director, OWCP, No. 79-2257, 13 BRBS 241 (7th Cir. April 8, 1981). The Court held that the Board can only review a claim based on the hearing record. No formal hearing record is developed before the deputy commissioner.

The proposed bill before the Senate restructures the claims procedure. While continuing to provide for the deputy commissioner's initial investigation of a claim, the legislation requires a preliminary ruling not later than 180 days after the employee or the employer or carrier notifies the deputy commissioner that claimant's condition has been certified as permanent and stationary or the employee has returned to work. This provision appears aimed at a quick resolution of a claim for permanent disability. Similar emphasis is not placed on the resolution of a claim for temporary or total disability, although such a claim may have a more immediate financial effect. In fact, there appears to be no clear provision for preliminary rulings for such claims. The deputy commissioner's preliminary ruling is served on the parties who have 30 days after receipt to appeal the ruling to the Board. Absent appeal, the recommendation stands as an award. The parties, however, may appeal the preliminary ruling to the Board. The Board shall, upon the request of a party, provide for a hearing before an administrative law judge designated by the Chairman of the Board.

Benefits Review Board

As Chairman of the Benefits Review Board for the last four years, I am in a unique position to lend the benefit of my experiences at the Board as well as my familiarity with the Board's functions and its operation. Therefore, my remarks to the Committee concerning Section 13 of S. 1182 (Section 21 of the Act) will be restricted to the Benefits Review Board and are not in any way directed to language in the bill that concerns itself with the Office of the Administrative Law Judges. I would strongly suggest, however, that familiarization with the current mechanics of the litigation process within the Department of Labor is of great importance to any final determination that may legislatively be made regarding the operation of a Benefits Review Board and Office of Administrative Law Judges organizationally structured along the lines proposed in S. 1182.

Congress created the Benefits Review Board in 1972 in an attempt to avoid inordinate delays by streamlining the adjudication of claims arising under the Longshoremen's and Harbor Workers' Compensation Act and its extensions. The Board, consisting of three Members appointed by the Secretary of Labor, in effect, performs the same judicial appellate function which the U.S. District Courts exercised prior to 1972. The term of office is indefinite with no procedures for removal.

S. 1182 establishes the Board as an independent agency retaining the same number of Members but providing for appointment by the President with confirmation of the Senate with six year fixed terms. Removal from office is based on inefficiency, neglect of duty or malfeasance.

I cannot emphasize strongly enough the need to expand the number of Members who shall serve upon the Board. Since I came to the Board in 1977, there has been a three-fold increase in the number of cases appealed. There are currently pending before the Board 2,372 appeals. It is accurate to say that the passage of the Black Lung Benefits Act of 1977 has resulted in a dramatic increase in the number of new appeals to the Board, but that the Longshore Act has continued to generate a predictable number of appeals each year ranging between 400-500. Additionally, the Board has jurisdiction to review appeals filed under the D.C. Workmen's Compensation Act, Defense Base Act, Outer Continental Shelf Lands Act, War Hazards Compensation Act, and Nonappropriated Fund Instrumentalities Act.

The present three Member Board is unable to handle our present workload. The Board is realistically capable of rendering an average of 75 decisions monthly. With an average of over 200 appeals being filed each month (Longshore and Black Lung) and with an average number of 75 decisions rendered monthly, there now exists over a 30-month backlog of cases. Even though it is assumed that the appeal rate from the Office of Administrative Law Judges decisions will begin to decrease each year due to established Board case law, the Board's pending caseload will continue to increase due to the limited decision-making capability of a three Member Board. If an appeal were to be filed today, I can estimate that it would take about two and one-half years before the Board's decision would be issued.

It is important to realize that the number of Longshore appeals to the Board has now begun to level off, almost nine years after passage of the 1972 Act. The passage of a new Longshore Act will begin an influx of new and increased litigation. This added to the already critical workload at the Board will severely burden the ability of a three Member Board to deliver timely due process to litigants and as such this Board will be rendered completely inefficient and ineffective by the Congress. I foresee no way of providing the parties with an "honest review" unless some expansion of the Board is realized. I would therefore encourage you to consider expanding the Board from its current three members to a Board composed of at least seven members.

In reviewing the need for seven members one must recognize the heavy volume of work now before the Board and potentially what will be before the Board in future years. A panel system should be initiated to meet such a workload. Having a Board composed of seven members would provide for greater flexibility by allowing members to sit in various combinations of panels of three. The Board now constitutes one panel of three and thus sits on every case. Without enhancing this flexibility, a three member Board is very restricted in its ability to increase the number of its decisions. I would recommend, however, that should the Board be expanded that it operate similarly to a Court of Appeals. I would be pleased to submit the details of how this revised operation could be organizationally structured should the Committee so request.

An important change proposed in S. 1182 is the removal of the Board from the Department of Labor and its establishment as an independent agency. This is a positive step. Too often the parties have viewed the Board not as a judicial body but as a mere appendage of the administrative process of the Department of Labor. Potentially the Board could be constrained by numerous Departmental policies and practices involving personnel, allocation of budgetary resources, space requirements, office equipment needs, etc. The Board must compete with other adjudicatory bodies within the Department of Labor (Office of Administrative Law Judges and Office of the Solicitor) for limited dollars and personnel positions. Further, the Department has a Management Review Committee that makes decisions on budgetary allocations within the Department and the Benefits Review Board is without representation on this Committee. I know of no effective way to insulate the Board within the Department so as to enhance its ability to operate and function as a totally judicial body. All of the cases reviewed by the Board involve substantial monetary awards, many over a million dollars. When examined in this context, the importance of the Board's role in deciding these cases and its judicial independence becomes significant to all parties involved. Therefore, thought should be given to making the Board a Court rather than its present state of a quasi-judicial body.

The relatively short duration of a term of six years coupled with an unrealistic salary schedule for these Board members is likely to severely hamper the ability of selecting and appointing individuals who are "especially qualified" as set forth in the current statute or who "by reason of training, education and experience are qualified to carry out the functions of the Board under this Act" as S. 1182 proposes. Consideration should be given to eight-year terms and provision for a definite salary schedule tied to the executive level pay schedule or preferably to that of federal district court judges. This would ensure that only the best and most capable individuals serve as Board members.

Concerning the provisions for removal, the term "inefficiency" lends itself too easily to convenient definition and potential manipulation of the Board members. For this reason, it is suggested that the term inefficiency be removed. The terms "neglect of duty or malfeasance in office" are consistent with language governing removal for most judicial body members and as such have been subject to previous interpretation and application.

Senator **NICKLES**. I appreciate your comments, and if you have some others, please give them to us, because we are very, very interested in coming up with a piece of legislation that, 2 years from now, we will not find as haunting. That is probably one of my biggest concerns. Please inform us of any advice that you have. I am very, very serious in that.

Our hearings tomorrow will begin at 9:30 in this room. We have several other panelists who will be coming from somewhat of a different perspective that I think will be very enlightening. We appreciate your cooperation.

This meeting will be adjourned until 9:30 tomorrow.

[Whereupon, at 11:56 a.m., the proceedings were recessed, to reconvene Wednesday, June 17, 1981, at 9:30 a.m.]

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1981

WEDNESDAY, JUNE 17, 1981

U.S. SENATE,
SUBCOMMITTEE ON LABOR,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, D.C.

The subcommittee convened, pursuant to notice, at 9:35 a.m., in room 4232, Dirksen Senate Office Building, Senator Don Nickles (chairman of the subcommittee) presiding.

Present: Senators Nickles, Williams, and Quayle.

Senator NICKLES. Good morning.

This is the second day of our hearings on the proposed amendments of the Longshore bill.

Today, we have a number of witnesses to testify both in favor of the bill and in opposition to the bill. I think that almost all of the people today will be offering somewhat different perspectives than what we had yesterday.

We continue to seek advice and input from all people, from all sectors, Members of Congress, and others. This particular piece of legislation is getting more attention, I think, nationwide, on the west coast, as well as in the papers nationwide. We had an editorial on it today in the Washington Post, there has been one in the New York Times, and there has been one in the Wall Street Journal. I think nationwide, a lot of people are starting to understand the need for some change.

We have a total of 14 witnesses. Our first guest today will be Robert Steiner. We are in session all day. It is possible that we will be having rollcall votes that will interrupt us; I hope we will not until after noon, and it is going to be my hope, desire, and intention, if at all possible, to move as quickly as possible.

Every statement that we have—and the statements are quite lengthy—will be entered into the record, and they will be studied and examined not only by staff, but myself and other Senators who have a very strong interest in this legislation. If all of our witnesses today would do us the favor and the other witnesses a favor, and summarize their statements to the points that they really feel should be emphasized, we would very much appreciate it, because we do have a very heavy load, as we do on Tuesday of next week. The administration will be testifying Tuesday of next week, and we expect that to take some time.

Mr. Steiner is the deputy director of the Port Authority of New York/New Jersey.

Mr. Steiner, welcome. We appreciate your input and the comments you have on S. 1182.

STATEMENT OF ROBERT N. STEINER, ASSISTANT DIRECTOR, PORT DEPARTMENT, NEW YORK, PORT AUTHORITY OF NEW YORK/NEW JERSEY

Mr. **Steiner**. Good morning, Senator, and thank you very much.

As you stated, I am assistant director of the port department of the port authority of New York/New Jersey. The port authority is a bi-State agency, created in 1921 by compact between the States of New York and New Jersey, to promote and protect the commerce of the New York/New Jersey Port District.

Since 1948, the port authority has invested approximately $560 million in marine terminal facilities. These facilities have an enormous impact on the economic vitality of the New York/New Jersey region. In 1980, the facilities employed some 9,000 people, with an annual payroll of $117 million.

Overall, in the Port of New York/New Jersey, port-related activities account for 154,000 jobs, with an annual payroll aggregating $3.1 billion. It is for these reasons that I am here this morning.

In 1972, the Longshoremen and Harbor Workers' Compensation Act of 1927 was amended to create a model uniform compensation statute, increase compensation benefits to adequate levels, extend coverage to all over-the-water workers, eliminate third-party suits based on the unseaworthiness principle, and improve the overall administration of the act.

However, in the ensuing years, the intent, which was to provide fair and equitable compensation for the port labor industry has become distorted, and compensation has skyrocketed.

During the past decade, the ocean transport industry has undergone a radical change, shifting from traditional, break-bulk cargo handling methods to containerization. Containerization should decrease the number of injuries due to the reduction of the number of piece-by-piece handlings and increase productivity. Yet in spite of this, the number of injuries have increased substantially.

The acceptance of intermodal container movements has also allowed shippers to choose the most economical routing for their cargo movements, and ports no longer enjoy the principle of captive cargo. And significant difference in cargo handling costs reflects in ultimate cost to the shipper, thus affecting the routing of cargo. Consider the differential presently existing in workmen's compensation between the New York/New Jersey Port District and the Canadian range of ports from Halifax to Montreal.

In New York, the general stevedore manual rate is $87.26 per $100 of payroll. In New Jersey, it is $67.80 per $100—compared to a range of $3 to $14 in the nearby Canadian ports.

In 1979, 2.1 million long tons of U.S. import-export cargo moved through Canadian gateways, of which 480,000 tons was reported to have moved through gateways in New York State alone. We believe the compensation differentials contribute to this diversion.

Although the port authority is not an employer of longshore labor, and therefore not directly subject to the ever-increasing compensation costs, we are deeply concerned over the economic effects on 154,000 port-related jobs because of the potential diversion of cargo.

We fully support Senator Nunn and you, Senator Nickles, in your legislation to revise the 1972 act which would place a cap on the annual escalation of benefits, improve the process of selection and supervision of medical care, close loopholes which invite fraud and abuse, make the act insurable by specifically identifying those employers and employees covered and remove the unrelated death benefits provision.

We unequivocally state that we believe it is the employer's obligation to provide safe working conditions and take such action as necessary to promote and aid in safety programs for their workers, as well as to provide reasonable compensation to those who are unfortunately injured on the job.

Senator, I thank you.

[The prepared statement of Mr. Steiner follows:]

Labor Subcommittee's Longshoremen's and Harbor Workers' Compensation Act

S 1182

Prepared Statement of Robert N. Steiner, Assistant Director,
Port Department, The Port Authority of New York & New Jersey

Mr. Chairman and Gentlemen:

My name is Robert N. Steiner. After graduation from the United States Merchant Marine Academy in 1962 and having served for a brief period of time on United States flag merchant vessels, I was employed by Sea-Land Service, Inc. in their Marine Operations Department. In 1967, I joined the Port Authority of New York and New Jersey, and after serving in various positions in management am now Assistant Director of the Port Department. The Port Authority is a bi-state agency created in 1921 by compact between the states of New York and New Jersey to promote and protect the commerce of the New York/New Jersey port district. Since 1948, approximately $560 million has been invested by the Port Authority to provide the most modern and efficient marine terminals available. These include the Port Elizabeth Container Terminal consisting of over 1200 acres and 3 miles of wharf for vessel berthing, truly "America's Container Capital."

These facilities have an enormous impact on the economic vitality of the region. In 1980, the facilities provided direct employment for 9,000 people with an annual payroll of $117 million. Overall port related activities account for 154,000 jobs with an annual payroll aggregating $3.1 billion.

It is for these reasons that I come before you today.

In 1972, "The Longshoremen and Harbor Workers' Compensation Act of 1927" was amended to create a model uniform compensation statute, increase compensation benefits to adequate levels, extend coverage to all over-the-water workers, eliminate third party suits based on the "unseaworthiness" principle and improve the overall administration of the act. This was indeed a necessary and admirable approach. However, in the ensuing years, the intent which was to provide fair and equitable compensation for the port labor industry has become distorted. In actuality, there has been an abuse of the system resulting in a dramatic increase in compensation costs to the employer thus driving up the overall cost of cargo handling.

These increases can be traced to the provisions in the 1972 amendment which encouraged fraud, mismanagement and provided no incentives for workers to return to work. Adding to the problem, the provisions also extended coverage to occupations other than over-the-water and led to breakdowns in efficient management. Contributing to the difficulties in administering the act are the dramatic rise of reported injuries in the year following 1972. The 205,000 injuries, which ocurred in 1977, according to U.S. Dept. of Labor figures, amounted to a 185% increase over 1972 as compared to a decline from 96,900 injuries in 1969 to 72,000 in 1972 or a reduction of 25%.

The ocean transport industry has been undergoing a radical change over the past decade in the shift from traditional breakbulk cargo handling methods to containerization. Containerization should decrease the number of injuries due to the reduction of the number of piece by piece handlings, increase productivity and decrease the number of longshore man hours worked. Yet, in spite of this, the number of injuries have increased substantially.

The acceptance of intermodal container movements has also allowed shippers to choose the most economical routing for their cargo movements and ports no longer enjoy the principle of "captive cargo." Competition for cargo between U.S. ports has always been keen, and rightly so. However, a new element has now appeared which jeopardizes U.S. ports competitive position with Canadian ports. Any significant difference in cargo handling costs reflect in ultimate costs to the shipper thus affecting the routing of cargo. Consider the differential presently existing in Workmen's Compensation between the New York/New Jersey Port District and the Canadian range of ports from Halifax to Montreal. In New York, the general stevedore manual rate is $87.26 per $100 of payroll, in New Jersey, it is $67.80 per $100 compared to a range of $3 to $14 per $100 in the Canadian ports. I should also note that prior to the 1972 amendment the manual rate was $29.90 per $100 in New York and $15.33 in New Jersey. In the ensuing nine years, the increase has amounted to $57.36 or a 192% increase in New York and $52.55 or a 342% increase in New Jersey.

This significant difference in compensation is contributing to the ever-burgeoning diversion of U.S. cargo through Canadian ports. The U.S. Maritime Commission report of March, 1981 entitled "U.S. Exports and Imports Transshipped via Canadian Ports" estimated that in 1979 2.1 million long tons of U.S. import/export cargo moved through Canadian gateways. Of even greater significance to the New York port district is the 350,000 tons reported to have moved through gateways located in the State of New York. These commodities could be considered as hinterland cargo to the New York/New Jersey Port District.

Let me cite even more current figures. In 1980, the National Harbours Board of Canada reported that a total of 10.2 million tons of general cargo, of which

6.0 million tons were containerized, were handled through the ports of Halifax, St. John, Quebec and Montreal. This represents a gain of over 3.5 million tons compared to 1970 when 6.7 million tons of general cargo (1.5 million tons were containerized) moved through the same ports. In comparison, in 1970, foreign trade general cargo handled in the Port of New York/New Jersey amounted to 16 million long tons of which 8.5 million were containerized. In 1980, 15.1 million long tons, including 11.8 million containerized tons, were handled, an overall loss of 900,000 tons of general cargo. The addition of new liner services in Canadian ports including Cast, Dart Canada, TFL and others as well as the increase in the number of sailings also demonstrates the growth. As another example, let us look at the growth rate of the Port of Halifax. In 1970, there were 82 containership sailings; in 1980 there were 576.

As stated previously, the provisions of the present act with its liberal benefits have not only driven compensation costs up but have also led to the possibility of fraud and abuse and, as you know, contributed to the less than honorable methods by some in the industry in seeking means to curb compensation claims.

The Waterfront Commission of New York Harbor established in the mid 1950's has as one of its goals the reduction of pilferage and loss of cargo. They have certainly been successful in this effort. It is a pleasure to state that for fiscal year 1980, the Waterfront Commission reported that of the 1.9 million T.E.U.'s handled in the Port of New York/New Jersey, only 7 containers were reported as stolen or missing. However, their investigations have uncovered fraudulent compensation claims. Take, for example, a recent case of a man who was employed both as a fireman in a New Jersey community and a longshoreman. That man, awarded compensation for a waterfront injury, was found to be at the same time on active duty as a fireman collecting full salary. During this time period, he was also observed on a regular basis in a local gymnasium working out and lifting weights. Loopholes which permit this type of abuse must be closed.

Among other major problems that have stemmed from the 1972 act which made the LHWCH liabilities unpredictable are as follows:

1) Benefits escalation which play a major factor in the ever rising employers premium costs.
2) Confusion over jurisdiction as to who is covered by the term "maritime employment." No one today can say where LHWCA coverage ends and where state workers' compensation begins. It has also created intensive litigation and caused reviewing courts to complain about the lack of clarity in the present act. As an example, the act now covers, in addition to longshoremen and harbor workers, all private employers in the District of Colombia, shipyards, small boat manufacturers, boat owners, marinas, yacht clubs, contractors, trucking companies, warehousemen, rail car loaders in port areas, guards, mechanics, and others.
3) Unrelated death benefits - The LWHCA is the only workers compensation law which pays death benefits to survivors of permanently disabled persons who die of any cause following their disablement.

These problems must be addressed. Although the Port Authority is not an employer of longshore labor and, therefore, not directly subject to the ever-increasing compensation costs, we are deeply concerned over the economic effect on the 150,000 port related jobs because of the potential diversion of cargo and the ever-present danger of fraud and abuse.

We fully support Senator Nunn's and Senator Nickles' legislation to revise the 1972 act which would place a cap on the annual escalation of benefits, improve the process of selection and supervision of medical care, close loopholes which invite fraud and abuse, make the act insurable by specifically identifying those employers and employees covered and remove the unrelated death benefit provisions. We also inequivocably state that we believe it is the employers obligation to provide safe working conditions and take such action as necessary to promote an aid in safety programs for their workers as well as to provide reasonable compensation for those who are unfortunately injured on the job.

Thank you Mr. Chairman

Robert N Steiner
Robert N. Steiner,
Assistant Director
Port Department

August 7, 1981

Mr. Robert Steiner
Assistant Director
Port Department
Port Authority of New York/New Jersey
One World Trade Center
Room 64 East
New York, New York 11048

Dear Mr. Steiner:

In June 1981, you appeared before the Senate Labor Subcommittee and presented testimony in the Longshoremen's and Harbor Workers' Compensation Hearings. Enclosed with this letter you will find a set of questions based on issues raised by your testimony. Please answer these questions as thoroughly as possible and provide supporting materials as appropriate. Iffany aspect of a question is not addressed in your answer, explain clearly the reason for this omission.

Your prompt response is appreciated, and in any event, your answers should be mailed no later than two weeks from the date of your receipt of this letter.

Sincerely,

Harrison A. Williams, Jr.

HAW/11
Encl.

FOLLOW-UP QUESTIONS TO: ROBERT STEINER (ASSISTANT DIRECTOR, PORT DEPARTMENT, PORT AUTHORITY OF NEW YORK/NEW JERSEY)

1. During the course of the Labor Subcommittee hearings on the Longshoremen's and Harbor Workers' Compensation Act (June 1981), the allegation was raised that cargo was being diverted from American to Canadian ports at least in part due to the impact of the Act in this country. What other reasons could you suggest would also account for the diversion of cargo which is alleged to be taking place?

2. Name the Canadian ports that are receiving the cargo allegedly diverted from the Port of New York.

3. Do the Canadian federal or provincial governments provide financial subsidies for the eastern Canadian ports? If so, name the jurisdictions that provide such support and detail the amount(s)?

4. Explain why "manual rates" in New York and New Jersey differ by approximately $20.00.

5. In your testimony before the Subcommittee, you stated that containerization has made the docks safer. Explain the reasons upon which you base your conclusion.

6. The International Longshoremen's Association has proposed a maritime safety code. What reasons, if any, would you advance for not supporting such a code?

7. State, in detail, the efforts made by the Port Authority to improve safety for longshoremen in the Port of New York.

JR.
S. N.J.
[illegible] AUG 26 AM 6:57

August 21, 1981

Hon. Harrison A. Williams, Jr.
United States Senate
Committee on Labor and Human Resources
Washington, D.C. 20510

Dear Senator Williams:

I have, at hand, your letter of August 7, 1981 relative to my testimony in the S. 1182 (Harbor Workers' Compensation) Hearings in June of this year. You requested clarification of certain issues raised by my testimony. Below are listed the answers to your seven specific questions.

Q. "During the course of the Labor Subcommittee hearings on the Longshoremen's and Harbor Workers' Compensation Act (June 1981), the allegation was raised that cargo was being diverted from American to Canadian ports at least in part due to the impact of the Act in this country. What other reasons could you suggest would also account for the diversion of cargo which is alleged to be taking place?"

A. The volume of cargo now diverted to Canadian ports is a matter of fact - not opinion - and certainly not "alleged." The supporting statistical data contained in my June testimony was carefully compiled and verified. The economic impact, an estimated job loss of 3,000 to 4,000 jobs as a result of these diverted tonnages are based on factual data contained in the U.S. Department of Commerce Marad Report of 1981 - "U.S. Exports & Imports Transshipped via Canadian Ports." The reasons for these diversions are virtually all economic, and must be attributed to the provisions of the Act, especially those contained in the provisions of the 1972 amendment which have resulted in increases of over 200 percent in reported injury claims - during a period of technological advancement that logically should have reduced these costs, as well as other significant factors such as the regulatory loopholes that are now existent - whereby Canadian carriers are free to quote rates without interference from the U.S. Federal Maritime Commission. Acting legally under U.S. law, and under ICC filed tariffs, cargo is moved between U.S. points and Canadian ports at competitive costs, and then cutting the cost of the ocean leg of the movement - which is not subject to U.S. regulations - to the point where the total origin to destination costs strongly favor the Canadian ports. This situation hopefully will be remedied by passage of HR 3637 - a bill to "Provide for Jurisdiction over Common Carriers by Water engaging in Foreign Commerce to and from the United States, Utilizing Ports in Nations Contiguous to the United States." The Port Authority strongly supports this bill, as indicated in my testimony of June 18, 1981.

Q. "Name the Canadian ports that are receiving the cargo allegedly diverted from the Port of New York."

A. Montreal, Halifax, St. John (N.B.) and to a lesser degree Quebec City.

Q. "Do the Canadian federal or provincial governments provide financial subsidies for the eastern Canadian ports? If so, name the jurisdictions that provide such support and detail the amount(s)?"

A. Although we have no specific information at hand relating to Canadian subsidies, all major Canadian ports fall under the jurisdiction of the National Harbours Board, an agency of the Federal government of Canada.

Q. "Explain why "manual rates" in New York and New Jersey differ by approximately $20.00."

A. There are many more lost and non-lost time accidents filed and processed on the New York side of the harbor than in New Jersey. This, of course, is reflected in the higher unit cost of some $20 as noted in your letter.

The reasons for this differential are partly due to the degree of mechanization on the Jersey side, as exemplified by the container ports there, which are more conducive to safe working conditions.

Q. "In your testimony before the Subcommittee, you stated that containerization has made the docks safer. Explain the reasons upon which you base your conclusion."

A. The traditional occupational hazards of longshore work - sprains, hernias, broken bones, etc., resulting from heavy lifting, hauling, and other manhandling requirements of breakbulk cargo operations has been largely eliminated by the advent of containerization. Manual handling of cargo at a container terminal is almost nonexistent, and machines do most of the heavy "mule" work formerly required when cargo was handled and rehandled piece by piece. Above all, the number of handlings per ton is sharply reduced since the large number of individual pieces within a container is shifted only once - and mechanically at that.

Q. "The International Longshoremen's Association has proposed a maritime safety code. What reasons, if any, would you advance for not supporting such a code?"

A. Although we are familiar with OSHA's proposed rule for marine terminals we are not as yet aware of the International Longshoremen's Association proposed Maritime Safety Code and for this reason I cannot specifically comment on your question. However, I will reiterate my statement to the subcommittee - "We also unequivocably state that we believe it is the employers obligation to provide safe working conditions and take such actions as necessary to promote and aid in safety programs for their workers as well as to provide reasonable compensation for those who are unfortunately injured on the job," and further add The Port Authority of New York and New Jersey would support any program consistent with the objectives and goals of the Port Authority.

Q. "State, in detail, the efforts made by the Port Authority to improve safety for longshoremen in the Port of New York."

A. The Port Authority does not operate any of the marine terminals. The terminal operators alone are responsible for all operations including enforcement of safety rules and regulations, methods and procedures to be used at their terminals.

The Port Authority's major contribution to longshore safety is that of designing, building, and maintaining modern, efficient, safe working places. All Port Authority facilities meet the highest standards of fire equipment, shed lighting, and other safety features. The traffic control, police protection, and maintenance of safe roads in and around all pier areas at all times in all weather is another function that I feel the Port Authority can be justly proud, and may be considered as a positive contribution to waterfront safety. However, as pointed out earlier, the primary responsibility for longshore safety practices lies with the stevedores and/or steamship lines who lease and operate our facilities.

If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

Robert N. Steiner,
Assistant Director

Senator NICKLES. Thank you, Mr. Steiner.

A couple of questions. You mentioned the possible loss of jobs. Do you think, if changes are not made, that you will see a reduction in the number of jobs in your port area in New York and New Jersey?

Mr. STEINER. Most definitely, sir. We feel that the increased compensation costs, as well as other reasons, have already diverted cargo to Canada, and therefore, we have already taken a loss in jobs.

Senator NICKLES. Because of this diversion of cargo to Canada, you see that actually, there are probably less longshoremen, less people employed on the docks than there would be if we had a more reasonable——

Mr. STEINER. Yes, sir, no doubt about that.

Senator NICKLES. The system that is actually designed to protect longshoremen has basically cost them some jobs?

Mr. STEINER. We believe that, yes, sir.

Senator NICKLES. You mentioned in your statistics the cost for workers' compensation in your port area of what, $87?

Mr. STEINER. Eighty-seven dollars in New York and $67 in New Jersey.

Senator NICKLES. That is a substantial difference, but still very high as compared to Canada. How far are the Canada ports?

Mr. STEINER. Within 8 hours' drive.

Senator NICKLES. Within 8 hours' drive. But for a vessel coming from Europe, it probably is not that big of a diversion to go to Nova Scotia or New Brunswick?

Mr. STEINER. No, sir. In fact, to Halifax, it is a shorter distance. Into Montreal, of course, you must traverse the St. Lawrence which is just a little bit longer than New York.

Senator NICKLES. But their compensation rates are—what did you quote in your statement—$3 to $14?

Mr. STEINER. Yes, sir, $3 to $14, depending on the port in Canada.

Senator NICKLES. You are talking about rates in New York and New Jersey being anywhere from 20 times as high to almost 30 times as high, taking the $3, and on the $14, you are talking about a minimum of 3 times as high?

Mr. STEINER. Yes, sir, that is correct.

Senator NICKLES. Anywhere from 3 times as high to 30 times higher in the United States versus Canada. I wonder, do you know anything about their compensation programs?

Mr. STEINER. Not too much. We just know they are under a different system. We do not know too much about how it works.

Senator NICKLES. Do you think we can make some changes, possibly the changes that we have proposed in S. 1182, and still protect the working man as far as protecting him in his injuries?

Mr. STEINER. Yes, sir, I do.

Senator NICKLES. I apprecite that.

You mentioned another thing, too, that since 1972, we have had a dramatic increase in the number of injuries. Has there actually been, in your opinion, an increase in the number of injuries, or has there actually been just an increase in the number of claims? Is it more dangerous to work on the docks now than it was 8 years ago?

Mr. Steiner. As far as we are concerned, Senator, it should be safer with containerization. There is less piece-by-piece handling, there is less moving of heavy crates, there is less manual labor done. It should be a safer industry today than it was 10 years ago.

Senator Nickles. Because of the big containers, you do not have quite as many people crawling around with smaller boxes, or whatever that would require?

Mr. Steiner. That is correct, sir.

Senator Nickles. Is it actually safer to be on the docks now than it was 8 years ago?

Mr. Steiner. As far as we are concerned, yes, sir, it is.

Senator Nickles. I do not see the chart that we have, but we have seen a rapid escalation in the number of claims. I think you cited it also. Claims in 1972 look like they were in the vicinity of about 100,000 claims; today, or in 1979, there were 257,000 claims, about a 2½-fold increase.

Mr. Steiner. That is correct. In the years preceding the 1972 act, they had been decreasing as containerization took hold. And then there was a dramatic reversal a couple years after the 1972 amendments were made to the act.

Senator Nickles. And you think the number of claims is not because it is more hazardous, but because the law is more subject to benefits that possibly, in some cases, are not deserved?

Mr. Steiner. That is correct.

Senator Nickles. Very good. Mr. Steiner, I very much appreciate your comments, coming from where you are. I can tell you that, looking at your port area, your port authority, there are very definitely some problems. I looked at the compensation scales or the premiums nationwide, and you have, I guess, the unwanted or undesired distinction of having the highest worker-comp premiums anywhere.

Mr. Steiner. That is correct.

Senator Nickles. And hopefully, we will be able to make some changes. But I think, as Senator Nunn pointed out yesterday too, to solve those problems, some of the changes are going to have to be made from the people and from the businessmen. There is going to have to be a change in attitude and climate. This is not a retirement system or a system that is a free candy jar for everybody to reach in and take something. And hopefully, we will be able to take a big step in that direction with this legislation. But I do not necessarily think that this legislation will still be a panacea. We are going to have to have honest employers and employees. And I still inherently believe inside that the majority of employers and employees are honest; it is just a few who are possibly abusing the system at the expense of all the consumers and all the taxpayers.

Mr. Steiner. That is what we believe, Senator. As far as we are concerned, we would not care if these were longshoremen or businessmen or whatever. Particularly the 1972 act, there is no incentive to go back to work; there are a lot of things that are missing, and any industry would probably have fallen into the same problem we are running into today.

Senator Nickles. Hopefully, we can rectify that. If you see in our legislation, too—and again, I will throw this out to the other persons who have an interest in this legislation, either for or against it, we would very much solicit your advice on specifics regarding this legislation because we are talking about substantial changes in a very broad, very comprehensive law. I will remind everyone of that. We would be very willing and very receptive of your input.

Thank you very much.

Mr. STEINER. Senator, thank you very much.

Senator NICKLES. As our next panel, we have Thomas Wilcox who is executive director and general counsel of the National Association of Stevedores, and Dennis Lindsay, representing the Master Contracting Stevedore Association of Portland, Oreg.

I might mention, too, I believe all of our panelists have been advised that due to the number of people that we have today, actually 14 people, we are going to request that opening statements be limited to 5 minutes. We will not ring a bell, but we do request the 5-minute rule and hopefully this will allow us to go through our five panels today.

This will also allow me to get into some questions, if possible.

Mr. Wilcox, welcome. Do you want to lead off? You might tell us who else is with you, please.

STATEMENT OF THOMAS D. WILCOX, EXECUTIVE DIRECTOR AND GENERAL COUNSEL, NATIONAL ASSOCIATION OF STEVEDORES, ACCOMPANIED BY ARTHUR E. ERB, PRESIDENT, NATIONAL ASSOCIATION OF STEVEDORES; AND DENNIS LINDSAY, ESQ., REPRESENTING MASTER CONTRACTING STEVEDORE ASSOCIATION OF THE PACIFIC COAST, INC.

Mr. WILCOX. Mr. Chairman, sitting on my left is Arthur Erb, the president of the National Association of Stevedores, and also the president of Eller & Co., which is headquartered in Fort Lauderdale, Fla., but conducts its operations in the entire South Atlantic and gulf coast, from Virginia ports to Texas. Also with me in the back of the room are nine directors of the National Association of Stevedores, three of whom are past presidents, and one of whom is the past president of the National Maritime Safety Association. This is to indicate our interest in the pending legislation.

Mr. Chairman, the National Association of Stevedores is a nationwide membership trade association whose 65 members are privately owned stevedoring and marine terminal companies doing business in ports located on all 4 of the Nation's seacoasts, the States of Alaska and Hawaii, and the Commonwealth of Puerto Rico.

We are pleased to be here today to testify on S. 1182, the bill to amend the Longshoremen's and Harbor Workers' Compensation Act. As you know, during the 95th and 96th Congresses, two subcommittees of the House Committee on Education and Labor held a combined total of 22 days of oversight hearings on the Longshore Act to compile a record in excess of 3,000 pages.

The Senate Committee on Labor and Human Resources held oversight hearings on September 16, 1980. We respectfully request that the Senate hearing record which has been printed be included in this subcommittee's consideration of S. 1182, as authorized by the rules of this committee.

At the outset, let me say that NAS member companies fully believe in and support an equitable workers' compensation system which affords the worker injured on the job prompt and competent medical care, a viable rehabilitation program where needed, equitable compensation for loss of wages due to the industrial injury, and fair and equitable benefits to the survivors of persons who are killed in the workplace.

NAS member companies are dedicated to workplace safety. Testimony during the oversight hearings showed that the maritime industry spends annually between $15 and $25 million in the promotion of workplace safety.

We also believe that the system must be insurable, and the cost of the insurance affordable. The Longshore Act, as amended in 1972, is neither insurable nor is it affordable.

NAS member companies, like any other employer in the free enterprise system, must operate at a profit or go out of business. Workplace safety is an essential ingredient to profitable operations, especially in a highly competitive industry like the stevedoring/marine terminal industry.

So both morally and economically, the industry is dedicated to safety. However, notwithstanding annual expenditures in the tens of millions of dollars by this industry to promote safety, the cost of workers' compensation in the stevedoring and marine terminal industry has skyrocketed since the act was amended in 1972.

For example, manual insurance rates approved by insurance regulators of the several States for general stevedoring are now averaging over $32 per $100 of payroll nationwide.

For example, as we heard today and yesterday, the rate in New York is over $87 per $100 of payroll; in Texas, it is over $50; in New Jersey, it is over $60. At the same time, wages have increased by 152 percent. So the actual average cost of Longshore Act insurance nationwide has increased well over 200 percent.

According to the Department of Labor figures, during the 3-year period preceding the 1972 amendments, Longshore Act claims were steadily declining at a rate of 8 percent per year, from 96,000 in 1969 to 72,000 in 1972. Although, according to congressional testimony, the 1972 amendments extended coverage to an estimated 200,000 additional employees who were already covered by State workers' compensation laws, or an increase of people covered by about 20 percent, the number of claims filed annually has increased by 213 percent from 1972 to 1979, or an annual increase of 30 percent per year.

During this 7-year period, the annual payment of compensation of medical benefits has increased by 516 percent. In dollars, the annual actual payments have increased from $33.2 million in 1972 to $204 million in 1979, and estimates by the Labor Department for 1980 are that the actual payments for medical compensation will exceed $215 million.

But those figures only represent the annual actual payments, and do not include the full cost of the claims over their entire payout period. These increased costs are ultimately paid by American consumers, but the increased costs have another effect, as we have heard testimony yesterday and today, concerning the diversion of cargo to nearby competing ports in Canada and Mexico, which are in fierce competition and have been in fierce competition with American ports. This diversion of cargo causes a decline in American employment, a decline in employers' revenues, and a decline in the cargo base from which the employer must fund its obligations under ERISA.

Mr. Chairman, there is something drastically wrong about the Longshore Act. It has become greatly overutilized, abused, inordinately expensive, and virtually uninsurable. As Senator Nunn stated yesterday, it has attracted organized crime.

It is a plain fact that insurance companies are extremely reluctant to underwrite longshore risks, even at the high rates they are permitted to charge by the several State insurance commissions. The risks are uncertain and ill-defined; so much so that the Chief Justice of the Supreme Court described the act as being "as unclear as any statute could conceivably be."

When an unclear Federal statute is coupled with the announced policy of the Department of Labor 'o extend that statute to as many persons as possible, uncertainty is compounded and overutilization of the system is encouraged. Anyone knowing of that policy and the presumptions of compensability in the law would be foolish not to attempt to collect the high level of compensation the law provides.

Finally, Mr. Chairman, let me emphasize that the National Association of Stevedores believes in a just and equitable workers' compensation system which provides prompt and competent medical care and equitable compensation for workers truly injured in the workplace and to their survivors. We believe that where a State has jurisdiction over the employment, then the law of that State should apply. If there are instances where State law cannot apply, then and only then, Federal law should apply so that no worker is without adequate compensation. There is simply no valid reason why a worker who incurs an injury on land, near navigable waters, should receive compensation benefits any different from compensation paid to a worker who incurs the same injury in the same type of job in the same State or community.

We have carefully reviewed the provisions of S. 1182, and except in the few instances noted in our written statement, we urge its early enactment. S. 1182 will clear up the present ambiguities in the law which caused the Supreme Court, in a recent decision, to call the act, "a jurisdictional monstrosity," and will make the act an equitable and just compensation system for employees and employers.

If any compensation law is so onerous as this act is, that employers cannot afford it and insurance carriers cannot underwrite it, then the erosion of American jobs will steadily increase.

I would like to add at this point that, as Senator Nunn pointed out yesterday at the conclusion of his testimony, this association has actively undertaken steps as an outgrowth of the evidence disclosed in Operation UNIRAC and things that followed therefrom, to adopt a code of ethics which will be submitted to its membership and the U.S. Government, namely, the Federal Trade Commission and the Department of Justice, for clearance.

Thank you very much.

[The prepared statement of Mr. Wilcox and responses to questions by Senator Williams follow:]

TESTIMONY OF

THOMAS D. WILCOX, EXECUTIVE DIRECTOR AND GENERAL COUNSEL

NATIONAL ASSOCIATION OF STEVEDORES

BEFORE THE
SUBCOMMITTEE ON LABOR OF THE
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

JUNE 17, 1981

Mr. Chairman, my name is Thomas D. Wilcox. I am the executive director and general counsel of the National Association of Stevedores (NAS). The NAS is a nonprofit trade association whose 65 members are privately owned stevedore/marine terminal companies doing business on all four of the nation's seacoasts and in Alaska, Hawaii and Puerto Rico.

The stevedore is a person or firm that contracts with a ship owner or operator to unload or load ships while in port; the stevedore employs longshoremen. A marine terminal operator is a person or firm that manages the port area at which ships berth and on which cargo is held prior to loading and after unloading.

The NAS strongly supports reform of the Longshore Act and we are very grateful that at long last we are able to testify at Longshore legislative hearings. We already have sat through 23 days of oversight hearings during the 95th and 96th Congresses. The total printed record to date is over 3,500 pages and offers ample evidence as to why the Longshore Act should be amended. There is more and more public awareness of the need for changes in the Act. Recent editorials in the Wall Street Journal and the New York Times attest to that. So, these legislative hearings are indeed the next proper, logical and necessary step.

The stevedoring/marine terminal industry is a service industry, a vital link in our nation's transportation and economy. The industry has a heavy investment in labor, equipment and land.

Most longshore labor belong to one of two unions: on the Great Lakes, Atlantic and Gulf coasts and Puerto Rico, the International Longshoremen's Association; on the Pacific coast, Alaska and Hawaii, the International Longshoremen's and Warehousemen's Union. The current average hourly rate of a longshoreman is $12.40 plus fringes.

Equipment and land are also costly. Cranes cost up to $4 million each; a forklift truck can cost up to $340,000. Marine terminal property may be either leased or owned. Land to be leased ranges from the hundreds of thousands to several million dollars per year, depending on size and location. So, even though this service industry is not large, it is a necessary component in America's trade and it does make an important business commitment.

However, there is one aspect of costs that has gone haywire, and that is the cost of workers' compensation under the Longshoremen's and Harbor Workers' Compensation Act. The stevedore/marine terminal industry believes in and realizes the importance of safety in the workplace and conscientiously seeks ever safer conditions for workers. If for no other reason (and obviously there are other good reasons), the cost factor dictates safety. For example, in the Longshore hearing record in the 95th Congress the NAS vice president and past president of the National Maritime Safety Association testified that NMSA members spent between $15-25 million annually on training programs, safety meetings and accident prevention claims.

If, despite all earnest efforts to avert injury, an employee is injured, the industry also believes that the employee should get the best medical care and receive compensation benefits to replace lost earnings. A good workers' compensation program does just this. In order to cover these liabilities properly, an employer must either purchase workers' compensation insurance or self-insure if large enough to do so.

The Longshore program, especially because of the 1972 amendments to the Act, has instead resulted in exorbitant costs for employers, unsupervised medical care and little rehabilitation for employees, abuse of the system because of over-generous, easily obtainable benefits, and a virtually uninsurable risk.

The ills of the Longshore program have spread. In the Senate hearing record of last year, the NAS president discussed the diversion of American origin and destination cargo through ports in Canada. In March of this year, the Maritime Administration, U.S. Department of Commerce, published a new study on the Canadian diversion problem which shows that the amount of cargo diverted has substantially increased since the report referred to in our prior testimony. One of the factors contributing to that diversion is the high cost of the LHWCA paid by American stevedore companies compared to workers' compensation costs paid by their Canadian competitors creating a total stevedoring cost differential of 30 percent in favor of eastern Canadian ports over U.S. Atlantic ports. The summary of the recent Maratime Administration study is attached hereto and shows that for calendar year 1979 an estimated 2.1 million long tons (2240 lbs.) of U.S. cargo were diverted to competing Canadian ports--cargo valued at $3 billion. Unless something is done to reduce LHWCA costs, more U.S. cargo will be diverted through Canadian ports, resulting in fewer jobs for American employers and American labor.*

The costs of the LHWCA since its amendment in 1972 during the last week of the 92nd Congress have increased substantially as shown by way of example in analyses of the Act as they apply in two states, Alabama and Texas.

Those latter analyses show that the average hourly wage (excluding fringe benefits) of a longshoreman increased 152 percent between 1970 and 1980. The increase in LHWCA insurance premium cost increased over the same time period 138 percent in Texas and 122 percent in Alabama. Applying the increased insurance premium calculated at $100 of payroll against the increased wage base, the actual LHWCA cost increase is easily seen. In Texas the actual increase is 504 percent; in Alabama 464 percent. The actual dollar cost in

---

*The loss of cargo also reduces the base upon which union pension benefits and royalties are paid by stevedore employers and jeopardizes the employers' ability to meet their obligation under ERISA (Employees Retirement Income Security Act).

Texas increased from 96 cents per man hour to $5.80, and in Alabama from 48 cents per man hour to $2.70.

The cost increases referred to above apply to those longshoremen who prior to the 1972 amendments were subject to the LHWCA. It should be noted here, however, that the 1972 amendments also expanded the extent of the Act's coverage so that many employees not formerly covered by the LHWCA became entitled to the Act's largesse.

Because stevedoring is a service industry those costs must be passed on to the person who utilizes those services, who in turn must pass on the costs to the American consumer. If the stevedore is operating under a contract at a Department of Defense facility, the costs are absorbed by DOD and added to its costs of shipping military supplies and equipment overseas.

The drive for LHWCA reform once the impact of the 1972 amendments was felt and understood began in the 95th Congress when HR 13595 was introduced and the subcommittee on Compensation, Health and Safety of the House Committee on Education and Labor held 17 days of oversight hearings. Early in the 96th Congress HR 2448 and S.1511 (the same as HR 13595) were introduced, and the Labor Standards subcommittee of the House Committee on Education and Labor held five more days of oversight hearings, and the Senate Committee on Labor and Human Resources held one day of oversight hearings.

On June 18, 1980, Congressmen Erlenborn and others introduced HR 7610 which was an improved version of HR 2448. On the first day of the 97th Congress Mr. Erlenborn introduced HR 25 which is indentical to HR 7610 of the last session. A section-by-section analysis of HR 7610 - HR 25 is printed along with the text of HR 7610 in the appendix to the LHWCA oversight hearing record of the House Labor Standards subcommittee in the 96th Congress.

On May 14, 1981, S.1182 was introduced by Senators Nickles and Nunn. That bill is substantially the same as HR 25, and the section-by-section analysis of HR 7610 - HR 25 applies to it except as noted herein. The problems of the LHWCA as amended in 1972 which HR 25 and S.1182 address are:

1. Uncertain jurisdiction;
2. Payment of death benefits for deaths totally unrelated to employment or the compensable injury;
3. Absence of a uniform ceiling on death benefits;
4. Uncapped annual escalation of death benefits and permanent total disability compensation;
5. Absence of coordination of benefits from multiple compensation sources;
6. Inequitable and biased adjudication process;
7. Absence of effective medical care monitoring, and supervision of treating physicians;

8. Ineffective rehabilitation program;
9. Little or no incentive for an injured worker to return to work when physically able;
10. Ineffective means to prevent or reduce fraudulent or exaggerated claims.

Those problem areas are addressed by S.1182 in the following manner:

In 1972 Congress by PL-92-576 amended the LHWCA in several significant respects. One area touched by Congress was that of jurisdiction -- who was covered by the Act and therefore entitled to LHWCA benefits and compensation if injured. Prior to 1972 only those employees engaged in work over or on the navigable waters of the United States and who could not qualify for state workers' compensation benefits under state law were entitled to LHWCA benefits. Thus, the LHWCA prior to 1972 provided a federal remedy only where state laws could not.

That was all changed in 1972 when Congress brought the LHWCA ashore ostensibly to provide federal benefits to certain workers whose daily job caused them to work over navigable and adjacent land. Congress thus created a dual test for coverage -- the status of the employee (maritime employment) and situs of the injury (on or adjacent to navigable waters). That much the Supreme Court was able to comprehend in 1977 when it decided the first jurisdictional case involving the 1972 amendments to the LHWCA, Northeast Marine Terminal Co. v.

Caputo, et al. 432 U.S. 249 (1977). Having discerned the new test of jurisdiction rather readily, the Court then struggled to implement the test stating:

> "We turn to the question whether Caputo and Blundo satisfied the 'status' test -- that is, whether they were 'engaged in maritime employment' and therefore 'employees' at the time of their injuries. The question is made difficult by the failure of Congress to define relevant terms -- 'maritime employment,' 'longshoreman,' 'longshoring operations' -- in either the text of the Act or its legislative history."

The task was so difficult that during oral argument the Chief Justice stated that the LHWCA was "about as unclear as any statute conceivably could be" -- the Act remains so today, and unless amended by Congress it will always be so. In a more recent case, Sun Ship, Inc. v. Pennsylvania (No. 79-343) _____ U.S. _____ (1980) the majority of the Court stated:

> "The line that circumscribes the jurisdictional compass of the LHWCA -- a compound of 'status' and 'situs' -- is no less vague than its counterpart in the pre-'twilight zone' Jensen era."

The so-called Jensen case, Southern Pacific Ry. v. Jensen 244 U.S. 205 (1917) was decided 10 years before the original LHWCA was enacted. The "twilight zone" was created by the Court through decisions in 1942 and 1962. The Act, prior to those decisions or during the so-called Jensen era, was described by the Supreme Court in Sun Ship as a "jurisdictional monstrosity". S.1182 pending before this subcommittee will once and for all end the "jurisdictional monstrosity" created by earlier Congresses. It does so by specifically defining in sections 2(a) and 2(b) the terms "employee", "longshoremen", "ship repairman", "ship builder", "ship breaker", and "harbor worker". Thus, the bill would correct the failure of Congress in 1972 to define "relevant terms" and should make everyone's, including the Supreme Court's, task less difficult than it has been.

Sec. 2(d) further corrects the definitional failures of existing law by specifically defining the term "point of rest"* -- the dividing line between maritime and non-maritime activity on the nation's piers. Industry thought that was the dividing, or jurisdictional line, intended by Congress in 1972. The Supreme Court disagreed in Northeast because Congress did not in 1972 specifically state it intended that. Two years after its decision in Northeast the Supreme Court felt compelled to explain that decision in another jurisdictional case, P.C. Pfieffer Co., Inc. et al. v. Ford, et al. 444 U.S. 69 (1979) because of the lack of specific definitions in the Act.

It must be kept in mind that Congress enacted the LHWCA in 1927 to provide workers' compensation to a specified type of employee who might be injured while working over navigable waters only because a divided Supreme Court had said that the several states could not provide such coverage constitutionally. Thus, the Act was originally intended to provide federal coverage only where the states could not.

---

*A complete description of the origin of "point of rest" is set forth in Vol. II, Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act, Subcommittee on Compensation, Health and Safety, House Committee on Education and Labor, 95th Congress, Second Session at pages 396-424.

In 1972 Congress decided to enlarge federal jurisdiction and encroach upon state jurisdiction because it was of the opinion that the several states were not providing the level of benefits that Congress then thought appropriate. However, Congress only intended to increase benefits to those employees who were already covered by federal law "for part of their activity". The identical House and Senate Committee reports stated:

> "The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters on the adjoining land area. The Committee does not intend to cover any employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part, in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters."

The problem is that the words of the statute do not accurately express what the Committee reports indicate Congress intended. Because of that ambiguity and the absence of definition of key statutory terms the Department of Labor has taken the position that it has a duty to expand federal coverage as far as possible. On December 6, 1979, the Assistant Secretary of Labor for Labor Standards who administers the LHWCA stated before the Labor Standards Subcommittee of the House Committee on Education and Labor:

> "The Department of Labor has taken the view that we have an obligation to determine coverage in the maritime industries in such a manner as to protect the greatest number of individuals."

The Assistant Secretary did not explain that "maritime industry" employees were already "protected" by state law, and that the Department's expansion activities were not aimed at giving protection where none existed, but to replace existing state coverage with federal coverage. Faced with a never ending encroachment of federal jurisdiction over state jurisdiction, an ill-drafted federal law, and an unclear state/federal jurisdictional line, the Supreme Court in the Sun Ship case erased any notion of such a line and stated that Congress in 1972 simply superimposed federal law on top of state law, and the injured employee could take the higher of the two benefit levels available.

The purpose of the statutory definitions proposed in section 2 of the bill is to establish a clear line of delineation between state and federal law, and have federal law apply only in those areas and employments which arguably may be constitutionally denied to the several states. There is no reason to believe that state governments cannot or will not provide adequate workers' compensation to their citizens, and the history of the LHWCA and its administration by the Department of Labor do not demonstrate that the federal government can do any better a job than the state governments.

Section 3(a) of the bill amends section 3(a) of the Act (33 USC § 903) by providing that compensation is payable for disability or death of an "employee" as that term is redefined in sec. 2 and eliminates descriptive language made redundant by the specific definitions in sec. 2.

Section 3(b) of the bill amends sec. 3(b) of the Act (33 USC § 903) by deleting the word "solely" from the current provision, "No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee . . .".

In 1975 Cooper and Company prepared for the U.S. Department of Labor (Occupational Safety and Health Administration) a study entitled "A Causal Study of Accidents in the Longshoring Industry and OSHA's Effectiveness". One of the findings of the study (pp. 12-13) was that alcohol is a serious problem and that "it must be seriously influencing the national industrial accident rates, since the effects of alcohol on reaction time and on judgement are well documented . . .".

Present law permits a worker to receive workers' compensation benefits for work-related injuries incurred while the worker is intoxicated so long as the intoxication is not the sole cause of the injury or death. That provision leads to the anomalous situation that if a worker is intoxicated and falls down and dies without suffering a bodily trauma the death is caused solely by intoxication. On the other hand, if the worker is intoxicated and falls down and suffers a trauma which causes death, the death is not solely caused by intoxication and is thus a compensable injury. Walter v. Universal Terminal & Stevedoring Co., ____F. 2d ____ (1981); No. 80-2142 decided April 21, 1981, (3rd Cir.). Maryland Casualty Co. v. Cardillo, 107 F.2d 959, (D.C. Cir. 1939).

An intoxicated worker is a hazard both to himself and to his co-workers, and no one can argue that drinking on the job should not be discouraged. One sure way to discourage work place intoxication is to deny an injured worker compensation benefits if intoxication contributes to or causes the injury in any manner. Present law requires that intoxication be the sole cause of the injury or death, and that coupled with the presumptions in sec. 20 of the Act that the injury or death is compensable compels the employer to submit substantial evidence to overcome the presumption that intoxication was not the sole cause of the injury. As demonstrated in Walker v. Universal that imposes a heavy burden on the parties as well as the entire review process.

We believe that the LHWCA compensation system should no longer be burdened with litigation over the question of whether intoxication was the sole cause of the injury, and that the interests of safety demand that intoxication be an absolute bar to workers compensation benefits if it contributed to or helped cause the injury or death.

Section 3(c) of the bill adds a new section 3(c) to the Act which bars an employee from receiving compensation benefits if he made a false statement concealing a medical condition in an employment application; the employer relied upon the false statement; that reliance was a substantial factor in hiring the employee; and there is a causal connection between the false statement and the injury.

While this provision may be beneficial in some employments, it is not pertinent to the stevedoring/marine terminal industry or any other industry which does not directly control the hiring of workers, but secures them from union hiring halls on an as-needed basis pursuant to the applicable collective bargaining agreement. In most ports longshore labor may work for more than one stevedore employer in any given week, and their daily work assignments are arranged at the hiring hall.

Section 4(a) of the bill amends section 6(b)(1) of the Act (33 USC § 906) to foster an incentive to return to work when able by making 80 percent of spendable earnings (after-tax income) instead of 66-2/3 of an employee's average weekly gross wage the maximum compensation benefit payable, or 200 percent of the national average weekly wage, whichever is the lesser.

The provision also places the same limit on death benefits to survivors as for compensation to injured employees, and removes the "premium on death". Under present law a survivor can receive more in death benefits than the injured worker would have received for a permanent disability. Although the Department of Labor agreed that this "premium on death" was due to a drafting oversight or error in 1972, the Supreme Court ruled otherwise, Rasmussen v. Director, OWCP, 440 US 29 (1979). This bill would reverse the result of that decision.

This provision would eliminate present situations where a highly paid worker could receive more in compensation benefits, which are tax-free, than his after-tax earnings on the job. The 80 percent of spendable earnings maximum concept of the bill is in complete accord with recommendations R. 3.1, 3.6 and R. 3.13 and R. 3.20 of the 1972 Report of the National Commission on State Workmen's Compensation Laws. The difficulty with the 66-2/3 percent of gross earnings limitation and its destructive impact on the incentive to return to work is discussed in detail in a report of the Comptroller General entitled "Federal Employees' Compensation Act: Benefit Adjustments Needed to Encourage Reemployment and Reduce Costs" (GAO report HRD-81-19, March 9, 1981, GAO transmittal letter to Congress B-201930).

In a letter to Senator Williams (A-14508, A-14802) dated September 14, 1980 the Comptroller General stated:

> "When benefits are nontaxable, replacing a constant fraction of a disabled worker's gross earnings generally means the higher the worker's earnings, the greater the replacement fraction. Suppose, for example, that benefit levels were established at 66-2/3 percent of gross wages, as section 4(b)(1) would require. Using the standard deduction, if an employee had been earning $7,200 per year, was

married with two children, and filed a joint Federal income tax return with his spouse, and if they reported no other taxable income, his nontaxable benefits would amount to about 71 percent of his former after-tax earnings. If his earnings had been $20,000 per year, however, his benefits in the same circumstances would amount to 83 percent of his after-tax earnings. At still higher wage levels, his benefits might even exceed his former after-tax earnings, particularly if State income taxes, neglected here, are taken into account.

"If the disabled employee or his spouse were receiving other taxable income--if his spouse, for example, were also employed--his earnings would have been taxed at even higher rates than assumed in this example. In that case the nontaxable benefits would amount to an even larger fraction of the employee's former after-tax earnings. Figures will vary according to circumstances; but the conclusion is inescapable that if benefit levels are set at a constant fraction of an employee's former gross earnings, and are nontaxable, many persons will have little financial incentive to return to their former jobs.

"The 80 percent of spendable earnings rate [section 4(b)(2)] would preserve financial incentives for employees at all wage levels to resume work, if neither the employee nor his spouse were receiving any other taxable income. However, if the employee or his spouse were receiving other taxable income and filed a joint return, the employee might be financially better off continuing to receive workers' compensation benefits than to resume working."

The NAS fully supports the concept of the lesser of 80 percent of spendable earnings or 200 percent of the average weekly wage as the maximum compensation rate under the LHWCA for disability and death.

Section 4(c) of the bill defines "spendable earnings" and requires the Secretary of Labor to publish the tax tables needed to make the appropriate compensation calculations as is now done by the State of Iowa. (Sec. 6(f) of the Act) (33 USC § 906(f)).

Section 5(a) of the bill amends section 7 of the Act (33 USC § 907) by changing section 7(b) through (f) as follows:

7(b) - The employee's free and unsupervised choice of physicians is replaced by a limited and supervised selection from a list of physicians published by each deputy commissioner. Employers may submit a list of suggested physicians from which the deputy commissioner may compile the list.

(c)(1) The employee may select from the list of the deputy commissioner. If the employee is unable to make a selection the employer may make it for him. In emergency situations an employee may select a physician not on the deputy commissioner's list.

(c)(2) Deputy commissioner shall actively supervise medical care, require reports, and order changes in physicians when circumstances require it.

(c)(3)(A) Treating physicians shall not refer employees to specialist or consultants without (i) notifying the employer, (ii) providing the employer and deputy commissioner with reasons for the referral, and (iii) sending a medical report to the employer and deputy commissioner within 10 days of the first treatment.

New Section 7(c)(3)(B) provides that the employers shall not be liable for any expenses for referral to specialists/consultants unless the requirements of section 7(c)(3)(A) are met and the specialist/consultant furnishes the employer and deputy commissioner a full report within 21 days of the referral.

New Section 7(d)(1) provides that the employee shall not recover any amount expended by him for medical treatment from any physician not selected in accordance with section 7(b) and written notice is provided to employer within 10 days of the first treatment.

New section 7(d)(2) provides that the employer shall not be liable to the physician for any expenses unless the physician provides the employee, employer and deputy commissioner with a written report within 10 days of the first treatment.

New section 7(d)(3) requires the deputy commissioner to suspend all proceedings if an employee unreasonably refuses to submit to an examination by a physician selected by the employer or medical or surgical treatment, in which event the employer shall not be liable for penalties, attorney's fees, or compensation benefits during the period of the refusal.

New section 7(e)(1) directs the deputy commissioner to designate by medical specialty physicians authorized to make independent medical examinations at the request of the employer when medical questions arise. The employer is entitled to a report from such independent physician including an evaluation of any impairment determined in accordance with American Medical Association Guidelines. In the case of a pre-existing physical impairment the independent physician shall determine first (sec. 7(e)(2)) whether at the time of the examination the impairment is greater than the pre-existing impairment and whether the subsequent greater impairment was attributed to the prior impairment only or by the subsequent injury. If the latter, the employer would be entitled to relief under section 8(f) of the Act (the second injury fund) whether or not the employer knew of the preexisting condition at the time of first employment, or anytime thereafter. Sec. 7(e)(3) would permit either the employer or the employee to request another independent examination. Section 7(e)(4) requires the employee to submit to independent examinations as required by the deputy commissioner, and unreasonable refusal to do so would suspend all further proceedings.

New section 7(f) provides that allowable fees shall be those which prevail in the community, and that all fees shall be regulated by the deputy commissioner.

The amendments to section 7 do not eliminate the employee's right to select a physician nor require him to go to the "company doctor". The choice is limited, but it is limited only to those physicians that each local deputy commissioner determines are best equipped to treat occupational injuries. Except in emergency situations, the employee is not entitled to reimbursement from his employer if he seeks medical care from a physician not authorized by the deputy commissioner. The deputy commissioner in carrying out his duty to supervise medical care, which is in the interest of the injured employee, has the right to authorize, de-authorize, and regulate the fees of treating physicians.

The purpose of any workers' compensation regime is to insure prompt and adequate medical care for an injured employee, and the return of the injured employee to gainful employment as soon as possible. This is best assured by careful, timely, and intelligent supervision of all medical care, and the party best equipped to do that is the local deputy commissioner who should be familiar with the types of employment and medical services within his area of jurisdiction. Failure to provide proper supervision leads to the destruction of the system and converts it to a retirement program.

These provisions will insure that employees have available a list of knowledgeable and competent physicians in their area from which to select treatment, and will insure that any treatment given to them is closely monitored by the employer and the deputy commissioner, and that no unnecessary treatment or consultations are undertaken. These provisions should afford the injured employee the best medical care available in the area, and prevent doctor shopping and fraudulent or exaggerated claims, such as those uncovered by the New York Waterfront Commission in its investigation in 1974. (Special Report of the Waterfront Commission of New York Harbor Concerning Fraudulent Workmen's Compensation Claims in the Port of New York-New Jersey; Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act, Subcommittee on Compensation Health and Safety of the Committee on Education and Labor, House of Representatives, 95th Congress, vol. 1, pp. 370-409.)

Section 6 of the bill amends section 8 of the Act (33 USC § 908) as follows:

(a) The definition of "permanent total disability", other than the loss of specific parts of the body, shall be only when the employee proves by substantial evidence that he is permanently unable to earn any wages in any employment.

Under present interpretations of the LHWCA the employer is required to find suitable employment and prove that the employee can earn wages at a job and place suitable to the injured employee. The result is that an employee may be able to earn some wage, or actually earn a wage, and still be deemed permanently and totally disabled. The amendment to sec. 8(a) would require the employee to prove an inability to earn any wage as is now required by sec. 105 of the Internal Revenue Code. That section provides:

> "(4) Permanent and total disability defined. - For purposes of this subsection, an individual is permanently and totally disabled if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. An individual shall not be considered to be permanently and totally disabled unless he furnishes proof of the existence thereof in such form and manner, and at such times, as the Secretary may require."

Furthermore, the National Commission on State Workmens' Compensation Laws in connection with its recommendation R. 3.11 (Report pg. 63) stated:

"Permanent total disability benefits should be paid to a worker who experiences a work-related injury or disease which leads to a permanent impairment that makes it impossible for him to engage in any substantial gainful activity for a prolonged period. If a worker earns income subsequent to his injury, he may be eligible for the permanent partial disability benefits . . .". (Report pg. 64.) Section 8(a) is further amended to provide that compensation for permanent total disability shall be the lesser of 200 percent of the average weekly wage or 80 percent of spendable earnings for the duration of the disability, but that compensation shall be reduced by the amount of social security and other benefits received. The 80 percent of spendable earnings limitation is the same as recommendation R. 3.12 of the National Commission report.

Section 8(b) of the Act is amended to provide that compensation for temporary total disability shall be the lesser of 200 percent of the average weekly wage or 80 percent of spendable earnings, and that compensation shall terminate when the employee reaches normal retirement age. As the purpose of workers' compensation is to replace lost wages or earnings caused by an industrial injury, there is no rationale to continue wage-loss payment after the worker reaches retirement age. At that time, the worker normally would receive social security, pension and other retirement benefits predicated upon his gainful employment prior to retirement and the onset of the temporary total injury. This amendment would remove the pension aspect of the LHWCA.

The amendment to section 8(c) which places the same 80 percent of spendable earnings limitation on permanent partial disability compensation is consistent with the thrust of these amendments to change from the 66-2/3 of gross wages limitation to 80 percent of spendable earnings.

Section 6(b)(2) of the bill amends section 8(c)(13) of the present law by providing a comprehensive regime for determining and compensating for hearing loss, and removes the limitations under present law that loss of hearing in one ear be compensated for 52 weeks, and in both ears for 200 weeks. The NAS believes that the time period must be restored to the scheduled loss.

Section 6(b)(3) of the bill further amends section 8(c) of the Act by redesignating sections 20 and 21 as 22 and 23 and adds a new section 21 to the list of scheduled injuries; "Spine: In the absence of a herniated or ruptured disc 312 weeks of compensation." The NAS does not support this provision.

Section 8(c)(21) of the Act, redesignated 8(c)(22), is amended to provide that for all injuries other than those included as scheduled awards, compensation shall be two-thirds of the difference of the pre-injury average weekly wage and post-injury earning capacity until the employee reaches normal retirement age. It also codifies the Supreme Court decision in Potomac Electric Power Co. v. Director, OWCP, (No. 79-816) ___ US ___ (1980), that if an injured employee is entitled to scheduled benefits, he may not elect benefits under section 8(c)(22). It also permits automatic reductions in compensation if the pro-injury wages exceed pre-injury average weekly wage. If the post-injury wages decrease, the employee may request an increase in compensation.

These particular provisions will insure that compensation paid for permanent partial injuries truly reflects the actual loss of wages due to the injury by permitting periodic adjustments to meet wage changes, while retaining the incentive for partially injured employees to seek gainful employment.

Section 6(c) of the bill repeals section 8(d)(3) of the Act which provides survivor benefits in the event an employee with a permanent partial disability dies from causes totally unrelated to his employment or employment-related injury. The present life insurance provision of section 8(d)(3) is found in no other workers' compensation law and distorts the purpose of the workers' compensation.

Section 6(d) of the bill amends section 8(3) of the Act to conform with the maximum limitation on benefits for temporary total injuries to all other categories set forth in the Act.

Section 6(e) of the bill amends section 8(f) of the Act to provide for a conservator or attorney to defend the special (second injury) fund to insure that only legitimate cases are accepted into the fund and permits the settlement of cases in the special fund. This section is patterned after the Workers' Compensation law of the State of New York, and specifies that cases in the fund may be settled. The Secretary of Labor claims that under present law cases in the fund may not be settled.

The number of cases in the fund has grown dramatically since the 1972 amendments with about 28 new cases being put in the fund each month. Annual compensation benefits paid from the fund have increased from $23,000 per year in 1972 to $12 million projected for 1981. Cases in the fund are not monitored by the Department of Labor. The cost of the fund is borne by self-insured and insurance carriers by an annual assessment by the Secretary of Labor on a pro-rata basis. This section would permit careful monitoring of cases in the fund, settlement where appropriate, and insure that the fund is not abused.

Section 8(j) of the Act is amended to strengthen the rehabilitation provision of the Act by providing full compensation benefits while an employee is participating in a rehabilitation program supervised by the deputy commissioner. Unless rehabilitation is found to be unnecessary by the deputy commissioner, employer and employee, no benefits for permanent total disability will be allowed if rehabilitation is refused. If an employee unreasonably refuses to participate, he will be entitled to no benefits during the period of that refusal.

This provision encourages rehabilitation of those injured employees who can participate and provides an incentive to seek gainful employment as soon as practicable. It will discourage fraud, exaggerated claims and malingering. Present law does not require that an injured employee seek rehabilitation nor provide any sanction or reduction in compensation for refusing it.

Section 8(h) of the Act is amended to define wage earning capacity of a partially injured employee to be the post-injury wages he is able to earn. If the employee voluntarily limits his post-injury earings, then his wage earning capacity would be that which he could have earned had he not voluntarily limited his earnings. The burden of proof of loss of earning capacity shall be on the employee.

This provision is similar to the recently enacted workers' compensation law in Florida, and places the burden of proof of the loss of earnings on the employee seeking compensation. This provision is consistent with provisions in the Internal Revenue Code § 105, and is intended to foreclose fraudulent and exaggerated claims and malingering.

Section 8(i) of the Act is amended to permit the settlement of all compensation claims including survivors claims. It requires the deputy commissioner to approve all submitted settlements unless the settlement is grossly inadequate or obtained by duress. The disapproval of a settlement may be appealed by any party thereto to the Benefit Review Board. Settlements may be either periodic payments or lump sums, or discounted lump sums.

This amendment will permit the prompt settlement and processing of claims in which there is no dispute between the affected parties and will prevent the deputy commissioner from unreasonably refusing to approve any valid settlement while still protecting injured workers and survivors from unduly inadequate or forced settlements.

Finally, Section 6(j) of the bill adds new section 8(j) to the Act to provide that entitlement to benefits for occupational diseases is to be determined by the state law of the state in which the last exposure to the disease producing or aggravating stimulus occurred. There is no specific provision in the Act now which covers this subject.

Section 7 of the bill amends section 9 of the Act (33 USC § 909) by amending section 9(a) to remove the provision awarding death benefits to survivors of permanently totally disabled employees who subsequently die from causes totally unrelated to the compensable injury or employment. This amendment removes the life insurance aspect of the Act while providing survivors benefits only in cases where the death is employment related. The current "unrelated death" provision is found in no other workers' compensation law, and is alien to the concepts of workers' compensation.

Subsections (d) and (e) are amended to provide that survivors benefits shall be no greater than the maximum compensation received by the injured employee, thus removing the "premium on death" under present law by which the survivors can receive more compensation than the injured employee. This amendment corrects an admitted drafting error in 1972 and overturns the Supreme Court decision in *Rasmussen v. Director, OWCP*, 440 US 29 (1979).

Section 8 of the bill amends section 10 of the Act (33 USC § 910) to change the method of calculating the average weekly wage of an employee to better accommodate current employment practices. This section has not been changed since 1927 when the Act was originally passed and employment practices were differnt.

New section 10(a) provides that the average weekly wage of an employee who worked in the covered employment for substantially the entire year will be his total wages in that employment divided by 52.

New section 10(b) provides that if the employee worked for more than one employer during the year, his average weekly wage could be the total earnings from all covered employments divided by 52, but not more than the average weekly wage of employees in the same or most nearly similar employment.

New section 10(c) provides that the average weekly wage of an employee who did not work substantially the entire year in a covered employment to be his total earnings divided by the number of weeks actually worked, but not more than the average weekly wage of employees who worked in that employment regularly.

These provisions not only modernize the method by which average weekly wage is computed but will exclude from such computation wages earned in employments not subject to the Act or earned outside of normal working hours.

Sections (d) and (e) are repealed as they are no longer applicable, and section 10(f) renumbered (d) is amended to limit the annual escalation of compensation for death or permanent total disability to no more than 3 percent. The present escalation based upon increases in the national average weekly wage without any limit is the prime cause of unpredictability of risk and renders employers' liability virtually uninsurable.

Insurance premiums must be paid and reserves established for the life of the claim as soon as the accident occurs in order to properly fund the compensation-paying mechanism, be it insurance carrier or self-insured employer. Since it is impossible to forecast the annual increase in national average weekly wage, it is impossible to estimate with any degree of accuracy what the claim will cost. If a self-insured underestimates the value of the claim, it may have no assets from which to pay it in its later years of development. If an insurance carrier makes the same mistake, it has no premiums from which to pay the claim. Thus, insurance carriers are not willing to underwrite the LHWCA risk because they cannot predict what the full extent is of the risk. Self insurance to which large employers must resort places restrictions on the employers' capital, and as claims grow over the years the ability to post the necessary security becomes more difficult and ties up the employers' assets.

Replacing the uncapped escalator with a maximum limit of 3 percent per year will make the risk more predictable and improve the "uninsurability" problem, but it will not alone make insurance affordable. It is an essential step, however, to restore the insurability and affordability to employers' liabilities under the Act.

Section 9 of the bill amends section 12(d) of the Act (33 USC § 912(d)) by providing that unless the employer has actual knowledge that the injury or death is employment-related, one seeking benefits under the Act must file a claim within the 30-day period following the injury or death as provided in section 12(a). This amendment will assure that the employer and deputy commissioner receive timely notice of any claim. This will permit the deputy commissioner to properly monitor the medical case pursuant to section 7 of the Act, and that the employer not be responsible for claims about which it has no knowledge.

Section 10 of the bill amends section 14(b) of the Act (33 USC § 914(b)) and provides that voluntary compensation payments by the employer are not required to be paid until the employee actually files a claim and the deputy commissioner so notifies the employer. Present law requires payment when the employer has constructive knowledge of the injury or death which has been deemed to be the time anyone in his employ has knowledge of the injury. This amendment in effect makes the time of filing a claim, rather than the date the employer has knowledge of the injury, the starting date of the compensation process.

Section 14(f) of the Act is amended to provide that if the employer does not place in the mail a compensation payment within 15 days after receiving a notice of award from the deputy commissioner, a 20 percent penalty shall be added to the compensation due. Present law requires actual delivery to the employee within 10 days of the due date. The amendment is reasonable and conforms to modern business practice and creates no hardship on the injured employee. The penalty shall not be added if the employer files a timely appeal of the compensation award and makes compensation payments to the employee during the appeals process.

Section 14(g) is amended by extending the period from 16 to 30 days within which the employer must notify the deputy commissioner that a final compensation payment has been made.

Section 14(h) is repealed and its provisions included in section 7 as amended by this bill.

A new section 14(l) is added to provide that compensation benefits for unscheduled permanent partial injuries shall not exceed the maximum benefits payable for a scheduled permanent partial injury. That period is 312 weeks, after which the employee should have been rehabilitated, returned to full employment, or have applied for permanent total disability benefits. This amendment encourages rehabilitation where appropriate and discourages malingering.

New section 14(m) is added to the Act which would coordinate all disability, pension and employment benefits so that the total amount of such benefits payable shall not exceed 80 percent of the employee's spendable earnings prior to the injury. Should the total of such benefits exceed 80 percent of spendable earnings, then the workers' compensation benefits shall be reduced in an amount necessary to reduce the total benefits received to 80 percent of spendable earnings. Should circumstances later change, LHWCA compensation benefits shall be adjusted up or down to meet the 80 percent of spendable earnings limitation.

This amendment prevents the pyramiding of benefits an injured employee or survivor will receive and will discourage the use of an employment-related injury as an inducement for early retirement. The need for coordination of benefits was recognized by the National Commission on State Workmen's Compensation Laws, which stated in its report (pg. 66);

> "We believe also that it is appropriate to integrate workmen's compensation benefits with other benefits provided by the employer."

Also, the Commission recommended (R. 3.27) that workmen's compensation death benefits be reduced by the amount of any payments received from Social Security by the deceased worker's family. Such a provision, said the Commission, would add equity to the workmen's compensation system, and suggested that retirement programs which include survivor benefits could also properly offset workmen's compensation benefits. Thus, new section 14(m) is in accord with the Commission's recommendations, and will help restore the viability of this troubled compensation program.

Section 11 of the bill amends section 19 of the Act (33 USC § 919) by requiring deputy commissioners to issue a preliminary report and recommendations within 180 days after (a) the treating or examining physician certifies that the the employee's medical condition has stablized or (b) the employee has returned to work. If neither the employee nor the employer file an appeal of such ruling within 30 days, the preliminary ruling of the deputy commissioner shall become a final nonappealable compensation order. This amendment will expedite the claim process and eliminate administrative delays in the vast majority of claims.

Section 12 of the bill repeals section 20 of the Act (33 USC § 920) which contains rebuttable presumptions that (1) any claim filed is covered by the Act, (2) sufficient notice has been given, (3) that the injury was not caused solely by intoxication of the employee, and (4) the injury was not caused by the willful intention of the employee to injure himself or another. The burden is on the employer to rebut those presumptions by substantial evidence. That burden is impossible to carry in cases of unwitnessed and late reported claims, and encourages the filing and exaggeration of claims. Under present law an employee need only allege an injury and the presumptions of section 20 virtually require a finding of a compensable injury, as all doubts of fact are to be resolved in favor of the claimant. The full range to which courts have taken the presumptions of compensability are set forth in Riley v. U.S. Industries/Federal Sheet Metal, Inc. ___ F.2d ___, No. 79-1417, decided May 20, 1980 (D.C. Circuit), in which the Court stated:

> "The foregoing cases make clear the pervasive scope of the statutory presumption of compensability. Indeed no decision of this Court has ever failed to apply the presumption to any facet of any claim before it." (Emphasis supplied.)

When a court consistently applies a presumption in favor of compensability to "any facet of any claim before it", the difficulty to marshal substantial evidence to rebut the presumption is readily seen. It simply cannot be done, and thus the incentive to file an exaggerated claim is greatly enhanced because the chances are that one will prevail with assistance from the presumptions.

Section 13 of the bill amends section 21 of the Act (33 USC § 921) by establishing an independent Benefits Review Board to hear appeals from compensation orders issued by deputy commissions in the Department of Labor. The Board's members would be appointed by the President for specific terms with the advice and consent of the Senate. The Board would have sufficient Administrative Law Judges in its employ to conduct evidentially administrative proceedings on matters appealed to the Board. The Board and the Administrative Law

Judges would have all the powers of any other federal administrative agency, including discovery powers, the issuance of subpoenas, and promulgation of rules and regulations. As under present law, appeals from a final decision of the Board may be taken by any aggrieved party to the appropriate U.S. Court of Appeals. Payments of fines and legal fees shall be stayed during the appeal process, but not periodic payment of compensation or death benefits.

Under present law the Benefits Review Board is a part of the Department of Labor and its members are appointed by the Secretary of Labor for indeterminant terms. The Senate has no authority to review the qualifications of Board members, nor has anyone other than the Secretary of Labor. Also under present law the Administrative Law judges are employees of the Department of Labor as are all the deputy commissioners and the Director, Office of Workers' Compensation Programs who administers the Act. Thus, the Secretary of Labor, or his designee, administers the claim process and then adjudicates any dispute over the way in which he or his designee administers the program. In effect, the Secretary is the Judge (BRB), jury (ALJ), and prosecutor (Director, OWCP) in any claim filed for compensation.

This amendment would separate the appeals process from the administrative process of the Department of Labor and establish an independent reviewing authority of the Secretary's actions. It would remove politics from the adjudicatory process, and is in consonance with the National Commission on State Workmen's Compensation Laws which recommended:

> "We recommend that the members of the appeals board or commission be appointed for substantial terms." (R. 6.3)
>
> "We recommend that the members of the appeals board or commission and the chief administrator be selected by the Governor [President] subject to confirmation by the legislature or other confirming body [Senate]."

Section 14 of the bill repeals section 21a of the Act (33 USC § 921a) which now authorizes the Secretary of Labor to appoint attorneys to represent the Benefits Review Board in court proceedings. As the Board would be independent of the Department of Labor, it must have the right to appoint its own attorneys to defend its decisions.

Section 15 of the bill repeals section 23 of the Act (33 USC § 923) as its provisions are incorporated in section 21 as amended by this bill.

Section 16 of the bill amends section 24 of the Act (33 USC § 924) by redesignating section 24 as 24(a) and adding "Administrative Law Judge". It adds new subsections (b) and (c) authorizing deputy commissioners and Administrative Law Judges to require the production of evidence by subpoena (b)(1); take testimony and administer oaths (b)(2); and enforce decorum in the hearings and compel the production of ordered documents (c).

Section 17 of the bill amends section 25 of the Act (33 USC § 925) to provide for witness fees in hearings held by an Administrative Law Judge as well as a deputy commissioner.

Section 18 of the bill repeals section 27 of the Act (33 USC § 927) as its provisions are included in amended section 24.

Section 19 of the bill amends section 28 of the Act (33 USC § 928) to provide that claims for claimant's legal fees to be paid by the employer must be first approved by the Benefits Review Board or court and are payable for services rendered only before the Board or court. Such approved fees shall be a lien upon the compensation payable.

Legal fees shall be assessed against the employer only when it has denied liability for compensation and the claimant later employs an attorney in the successful prosecution of the claim before the Benefits Review Board or appeals court. The receipt of a fee by any person representing a claimant which fee has not been approved by the Board or court shall be punished by a fine not to exceed $1,000, imprisonment for one year, or both.

Section 20 of the bill amends section 30(f) of the Act (33 USC § 930(f)) to provide that an employer must file a report of the injury within 10 days of the date the employer has actual knowledge of the injury or death and that it is employment-related. Should the employer fail to file the report, the statute of limitations for a claimant to file a claim shall be suspended until the report is filed. Knowledge of the employer must be actual and not constructive or implied.

Section 21 of the bill amends section 31 of the Act (33 USC § 931) to increase from a misdemeanor to a felony the penalty for filing fake claims or making false statements in connection with a claim. The office of the U.S. Attorney shall be directly responsible for investigating and prosecuting claims of false and misleading statements. This amendment will help to restore the integrity of the compensation system and permit prompt action in investigating and prosecuting offenders in lieu of the present ineffective procedures which require an investigation by the Department of Labor prior to any legal action being taken.

Section 22 of the bill amends section 33 of the Act (33 USC § 933) first by amending subsection (b) to add "Administrative Law Judge" to those who issue compensation orders. Subsection (e)(1)(A) is amended to delete "deputy commissioner", as the authority to approve reasonable attorney's fees is no longer the province of the deputy commissioner.

Subsection (f) is amended by redesignating it (f)(1) and adding new subsections (f)(2) and (f)(3). New subsection (f)(2) provides that if a person entitled to compensation receives from a third party by judgement or settlement any amount of money damages, the employer must be first reimbursed for all compensation benefits paid to the person entitled to compensation under the Act, and the person entitled to compensation retains the excess amount of damages.

The employer is entitled to credit for future compensation due in an amount equal to the excess of damages recovered from the third party. This amendment codifies recent Supreme

Court decisions, Bloomer v. Liberty Mutual Insurance Co., 445 US 74 (1980) and Edmonds v. Compagnie General Transatlantique 443 US 256 (1979).

Section 33(g) is amended to provide that if a person entitled to compensation enters into a settlement with a third party for damages in an amount less than compensation due, the employer will be liable for future compensation only if the employer approves the settlement in writing and the approved settlement is filed with the deputy commissioner. If the employee fails to notify the employer of any such settlement or judgement, all rights to any compensation under the Act shall terminate.

This amendment is necessary to insure that employers be reimbursed for compensation benefits paid where others have contributed to or caused the injury, and will also discourage secret settlements by which employees may receive windfall damages in addition to statutory compensation.

Section 23 of the bill amends section 39 of the Act (33 USC § 939) by amending the second sentence in subsection (c) to prohibit the Secretary of Labor from providing legal assistance to persons in processing a claim either within the Department of Labor or before the Benefits Review Board. The Secretary may appear in a court proceeding only as an intervenor by leave of the court.

This amendment will insure the impartiality of the administrative process in handling claims under the Act and will prevent the Secretary from causing litigation and raising issues which neither party, employer or employee, desires to raise. It would foreclose the unwarranted intrusion of the Secretary in disputes which are between private parties--the employer and the employee. A recent example of such unwarranted intrusion is White v. Ingalls Shipbuilding Division, Litton Systems, Inc., BRB No. 79-189, 12 BRBS 905, wherein the Director, OWCP appealed a settlement approved by the Administrative Law Judge and agreed to by the parties even though the Director was not a party to the proceeding before the Administrative Law Judge.

Section 24 of the bill amends section 40(f) of the Act, (33 USC § 940(f)) by adding "Administrative Law Judge" to those excluded from representing persons in the processing of claims under the Act.

Section 25 of the bill repeals section 41 of the Act (33 USC § 941) which authorizes the Secretary of Labor to publish and enforce safety regulations for employments covered by the Act. As such functions are now vested in the Administrator, Occupational Health and Safety Administration, this section is redundant.

Section 26 of the bill amends section 44 of the Act (33 USC § 944) by amending subsection (j)(2) to conform with other amendments and renumbering of sections of this bill. However, since this bill does not include a new section 53, the reference thereto should be deleted from this section of the bill.

Section 27 of the bill repeals sections 45, 46, and 47 of the Act (33 USC § 945 through 947) which are no longer appropriate.

Section 28 of the bill amends section 49 of the Act (33 USC § 949) and provides that the discharge or refusal to employ a person who has filed a fraudulent compensation claim shall not be unlawful discrimination within the meaning of section 49.

Section 29 of the bill specifically provides that these amendments are prospective only and will not diminish any compensation currently being paid to any individual.

The National Association of Stevedores believes that S.1182 will correct substantially the many problems all affected industries are confronted with by the LHWCA, while at the same time improve the administration of the claims process so that injured employees will receive prompt and adequate medical care, just compensation, and an effective rehabilitation program. The National Association of Stevedores strongly urges early enactment of this bill.

Thank you.

February 9, 1981

L&H COMP/RELATED COSTS AFFECTING COSTS OF SHIPPING AGRICULTURAL PRODUCTS

Compensation Rate for Texas - Code 7309F General Cargo - Bags.

Year 1970 - $21.28 per $100 of payroll	Year 1980 - $50.70 per $100 of payroll

Increase of $29.42 or 138%

Trend of Longshore Injury Costs - Average Cost per Claim for the West Gulf Area.

Year - 1970	$ 890.00 per claim	
Year - 1979	3904.00 per claim	338.65% increase
Year - 1980	6200.00 per claim	

From 1970 increase of 596.62%

Maximum Benefits Set by the Dept. of Labor for Injured Workers. (TAX FREE)

Year - 1970	70.00 per week		
Year - 1979	426.26 per week	508.94%	Increase from 1970
Year - 1980	456.24 per week	551.77%	Increase from 1970

National Average Weekly Wage.

Year - 1970	119.46 per week	
Year - 1980	228.12 per week	Increase of 91%

Wages for Longshoremen:

Year - 1970	4.60	
Year - 1980	11.60	Increase of 152%

LONGSHOREMEN'S & HARBORWORKERS' COMPENSATION ACT RELATED COSTS AFFECTING COSTS OF SHIPPING AGRICULTURAL PRODUCTS
MOBILE, ALABAMA

Compensation Rate for Alabama - Code 7309F - General Cargo - Bags:

1970	$ 10.53/$100 of Payroll
1980	$ 23.36/$100 of Payroll
Increase:	$ 12.83, or 122%

Trend of Longshore Injury Costs - Average Cost Per Claim for Alabama:

1970	Not Applicable
1979	$ 3,154.36
1980	$ 6,008.57 -- 90.5% Increase in 1 Year

Maximum Benefits Set By the Dept. of Labor for Injured Workers: (TAX FREE)

1970	$ 70.00 Per Week
1979	$426.26 Per Week - 508.94% Increase from 1970
1980	$456.24 Per Week - 551.77% Increase from 1970

National Average Weekly Wage:

1970	$119.46 Per Week
1980	$228.12 Per Week - Increase of 91%

Wages for Longshoremen:

1970	$ 4.60 Per Hour
1980	$ 11.60 Per Hour - Increase of 152%

U.S. EXPORTS & IMPORTS TRANSSHIPPED VIA CANADIAN PORTS

U.S. DEPARTMENT OF COMMERCE
Maritime Administration
Office of Market Development
Market Analysis Program
March 1981

INTRODUCTION

This report presents the dollar value and estimated tonnage for United States exports and imports transshipped through Canada for the year 1979. In January 1978, the Maritime Administration published a similar report which covered only exports for the year 1976.

United States' waterborne trade in 1976 totalled 698.8 million long tons of which 49.8 million tons were liner cargo and 1.4 million tons were transshipped through Canada. Similarly, 59.3 million tons of total liner carriage of U.S. imports and exports can be compared to the 2.2 million long tons transshipped in 1979.

This report for calendar year 1979 shows shipments arranged numerically by four-digit Schedules A and E commodity code under each selected U.S. Customs District by foreign country of destination for exports and by foreign country of origin for imports. These detailed statistics for significant U.S. Customs Districts are presented in separate appendices, E for Export and I for Imports.

SUMMARY

Exports

Table 1-E compares the dollar values and estimated tons for the years 1974 through 1979 via Canada through U.S. gateways. It would appear that the substantial increase for both dollar value and estimated tons in 1977 was largely due to conditions in the competitive environment that favored exports via Canada. Between 1977 and 1978 the estimated tons continued to increase, but at a flattened rate. While the dollar value dropped between 1977 and 1978, it increased substantially between 1978 and 1979. Two commodity categories accounted for 25 percent of the 1979 estimated tons: coke, pitch, and anthracene oil was 21 percent of the total and softwood lumber was the second highest in tonnage at four percent. Dollar value was spread more evenly with no one of the top ten commodities reaching ten percent of the total for 1979.

TABLE 1-E

ANNUAL COMPARISONS OF EXPORTS TRANSSHIPPED THROUGH CANADA

Year	Dollar Value (Thousands)	Estimated Long Tons
1974	459,942	579,037
1975	434,854	477,436
1976	496,715	587,987
1977	987,255	842,981
1978	978,842	867,469
1979	1,311,553	886,450

Imports

In Table 1-I, the summary examination of available data on U.S. Customs Districts in the Northern Tier for transshipments reveals a substantial increase in imports from 1976 to 1977, similar to that observed for exports. Both estimated tons and dollar value continued to increase between 1977 and 1979; however, the dollar increments were proportionally more significant. The two commodity categories that had the largest tonnages were nonferrous ores, 161,041 and crude materials 157,481, representing 26 percent of the total tonnage.

TABLE 1-I

ANNUAL COMPARISONS OF IMPORTS TRANSSHIPPED THROUGH CANADA

Year	Dollar Value (Thousands)	Estimated Long Tons
1976	757,855	815,745
1977	1,083,698	1,022,729
1978	1,696,173	1,140,936
1979	2,088,288	1,225,773

TRANSSHIPMENTS BY DISTRICT

Exports

In Table 2-E, comparisons are made of 1979's top six U.S. Customs Districts and other export transshipment gateways combined. The total of 13 Districts showed a 99 percent increase in dollar value from 1976 to 1978. Although the increase from 1977 to 1978 was less than one percent, a 33 percent increase can be observed from 1978 to 1979. During 1979 there were no transshipments through Chicago, Milwaukee, or Minneapolis, and a downtrend continuing from the 1977 high point for Portland, Maine, but the gateway Districts total to a 164 percent increase between 1976 and 1979.

The estimated long tons for export shipments listed in Table 2-E show more modest increases, a total of 43 percent, ranging from three percent for St. Albans to 66 percent for Detroit between 1976 and 1977. From 1976 to 1979, the total increase was 51 percent, continuing in 1979 the flattened trend that can be observed beginning in 1977.

In 1976, the transshipped export cargo had a value of $845 per ton, increasing to $1,171 per ton in 1977, but dipping to $1,139 in 1978 and increasing again to $1,480 in 1979. This represents a 75 percent increase in cargo dollar value per ton between 1976 and 1979.

TABLE 2-E

DOLLAR VALUE

EXPORT COMPARISONS OF CALENDAR YEARS 1976 THROUGH 1979 FOR U.S. CUSTOMS DISTRICTS WITH 1979 TRANSSHIPMENTS VALUED AT $10 MILLION OR MORE

(DOLLARS IN THOUSANDS)

Customs District	1976	1977	1978	1979	Changes 1976-79
Detroit	320,247	575,138	612,437	845,651	164%
Seattle	48,580	64,500	92,413	147,270	203%
Ogdensburg	45,818	123,030	94,475	125,889	175%
Buffalo	36,549	147,715	104,482	110.164	201%
St. Albans	10,911	20,355	33,480	53,605	391%
Portland	29,740	50,564	30,560	23,109	-22%
All Others	4,870	5,953	10,995	5,865	20%
TOTALS	496,715	987,255	987,842	1,311,553	164%

ESTIMATED LONG TONS

EXPORT COMPARISONS OF CALENDAR YEARS 1976 THROUGH 1979 FOR U.S. CUSTOMS DISTRICTS WITH 1979 TRANSSHIPMENTS OF 10,000 ESTIMATED LONG TONS OR MORE

Customs District	1976	1977	1978	1979	Changes 1976-79
Detroit	247,805	411,973	403,281	390,238	57%
Seattle	162,217	196,027	247,806	284,301	75%
Ogdensburg	27,287	83,730	57,295	74,214	172%
Buffalo	44,774	64,276	60,526	61,098	36%
Portland	83,551	62,256	71,931	35,659	-57%
St. Albans	19,739	20,414	18,820	32,869	67%
All Others	2,614	4,305	6,711	7,071	171%
TOTALS	587,987	842,981	867,469	886,450	51%

Imports

Imports into the United States from overseas countries through Canadian ports showed large increases in 1977, 1978, and 1979, as shown in Table 2-I. Two Customs Districts of clearance, Chicago and Cleveland, each gained more than 250 percent in dollar value between 1976 and 1978. Of these, Chicago with gains of $54 million from 1976 to 1977, $251 million from 1977 to 1978, and $163 million from 1978 to 1979 was the most significant in District increases with 410 percent between 1976 and 1979. In 1976, 1978, and 1979 Detroit and Chicago entered a combined percentage in excess of 50 percent of the total dollar value, ranging from 44 percent in 1977 to 64 percent in 1979. In 1979, 36 percent of the transshipments entered through Detroit, and 28 percent through Chicago.

As with exports, the estimated long tons percentage increases for imports through Canada are more modest in the aggregate than the value increases. However, the most significant District in all of the comparisons is Detroit with more than one-third of the total tonnage, gaining 50,654 tons from 1976 to 1977, 105,759 tons from 1977 to 1978, and 106,552 from 1978 to 1979. More than 25 percent of Detroit's total transshipment entries consisted of various parts for motor vehicles originating from the United Kingdom, 34,916; Belgium/Luxembourg; 38,519; France, 27,201; and the Federal Republic of Germany, 13,803. The combination of Detroit, Buffalo, and Chicago totals to almost 76 percent of the 1979 import transshipments. In Chicago 70 percent of the total tonnage originated in the Federal Republic of Germany, 37 percent; the United Kingdom, 17 percent; and France, 16 percent. Almost 67 percent of Buffalo's entries originated in Australia, 56 percent and Liberia, 10 percent. All of the total for Australia was nonferrous ores, and all of Liberia's was iron ores and concentrates.

In 1976, the transshipped import cargo had a dollar value of $929 per ton, increasing to $1,059 in 1977, $1,487 in 1978, and $1,703 in 1979. This represents an 83 percent increase in cargo dollar value from 1976 to 1979. In comparison, the MarAd 1980 annual report indicates that all liner carriage for the United States had a dollar value of $1,522 per ton in 1976, increasing to $1,722 per ton in 1977, $1,768 in 1978, and $2,063 in 1979, representing a 35 percent increase between 1976 and 1979.

TABLE 2-I

DOLLAR VALUE

IMPORT COMPARISONS OF CALENDAR YEARS 1976 THROUGH 1979 FOR U.S. CUSTOMS DISTRICTS WITH 1979 TRANSSHIPMENTS VALUES OF $50 MILLION OR MORE

(DOLLARS IN THOUSANDS)

Customs Districts	1976	1977	1978	1979	Changes 1976-79
Detroit	276,526	303,619	602,359	747,853	170%
Chicago	114,409	168,895	420,603	583,619	410%
Buffalo	120,932	138,804	122,834	134,547	11%
Ogdensburg	72,024	170,686	131,298	133,820	86%
New York	44,103	97,349	105,668	102,200	132%
Milwaukee	23,989	28,148	56,521	71,149	197%
Seattle	20,029	32,069	51,562	54,215	171%
Cleveland	14,442	33,910	57,056	51,712	258%
All Others	71,401	110,219	148,282	209,172	193%
TOTALS	757,855	1,083,698	1,696,173	2,088,281	176%

LONG TONS

IMPORT COMPARISONS OF CALENDAR YEARS 1976 THROUGH 1979 FOR U.S. CUSTOMS DISTRICTS WITH 1979 TRANSSHIPMENTS OF 30,000 LONG TONS OR MORE

Customs Districts	1976	1977	1978	1979	Changes 1976-79
Detroit	185,229	235,883	341,652	448,094	142%
Buffalo	163,249	205,607	216,744	250,981	54%
Chicago	89,731	126,378	243,973	231,269	158%
Ogdensburg	49,981	80,824	60,816	66,913	34%
Seattle	15,484	62,647	53,931	34,896	125%
St. Albans	10,967	24,343	29,605	34,280	213%
Milwaukee	17,694	18,334	32,185	32,953	86%
All Others	283,410	268,713	162,031	126,387	-55%
TOTALS	815,745	1,022,729	1,140,936	1,225,773	50%

TRANSSHIPMENTS BY COUNTRY

Exports

Table 3-E ranks our top ten export trading partners, transshipping via Canada, by descending 1979 dollar value. While the dollar value percentage increase to the top ten was 102 percent and for all others was 61 percent between 1976 and 1978, the respective increases for estimated long tons were 50 percent and 27 percent. Restrictions on exports to South Africa, which was ranked number nine in 1976, removed that country from the top ten for 1978 and 1979. There were no changes in the top five rankings since 1976, but a dramatic increase in both dollar value and tonnage to Switzerland moved this country into the top ten from the "all other" category in 1976.

Between 1976 and 1979, the dollar value increase was 173 percent for the top ten and 98 percent for all other countries. Corresponding increases for estimated tons were 53 percent and 35 percent.

TABLE 3-E

EXPORT COMPARISONS OF 1976 AND 1979 FOR THE TOP 10 DESTINATION COUNTRIES

	Dollar Value (thousands)			Estimated Long Tons		
Country	1976	1979	Changes 1976-79	1976	1979	Changes 1976-79
U.K.	113,245	319,339	182%	81,358	169,391	108%
W. Germany	57,144	205,867	260%	58,579	100,966	72%
Belgium/Lux.	98,845	204,705	107%	54,642	81,933	50%
Netherlands	57,951	147,935	155%	147,345	160,587	9%
France	46,712	146,429	213%	50,649	96,076	90%
Italy	13,601	41,197	203%	20,851	39,032	87%
Australia	20,755	36,935	78%	8,754	16,810	92%
Japan	17,530	34,304	96%	99,352	114,735	15%
Switzerland	6,830	30,962	353%	3,278	16,769	412%
Sweden	3,185	23,425	635%	2,885	8,753	204%
All Others	60,917	120,445	98%	60,297	81,398	35%
TOTALS	496,715	1,311,553	164%	587,988	886,450	51%

Imports

Table 3-I shows U.S. imports transshipped through Canada from major trading partners for 1978 and 1979 by descending 1979 dollar value. In 1978 more than 60 percent of the total dollar value and more than 50 percent of the total estimated long tons were transshipped through Canada by the three top trading partners: Federal Republic of Germany, United Kingdom, and France.

In 1979 these three accounted for 63 percent of the value and 44 percent of the tonnage. Zaire moved into fifth place in terms of dollar value with $102 million in total transshipments, of which $101 million was base metals, N.E.S., unworked, moving through Chicago.

TABLE 3-I

COMPARISON OF U.S. IMPORTS VIA CANADA FOR 1978 AND 1979 BY COUNTRY OF ORIGINATION

	Dollar Value (thousands)			Estimated Long Tons		
Country	1978	1979	Percent of Total	1978	1979	Percent of Total
W. Germany	512,340	638,924	31%	298,619	260,897	21%
U.K.	394,384	455,711	22%	186,716	166,388	14%
France	170,738	218,074	10%	105,406	111,955	9%
Belgium/Lux.	131,950	158,982	8%	87,530	101,976	8%
Zaire	28,527	103,431	5%	1,535	2,010	-
Japan	68,136	78,949	4%	53,477	33,502	3%
Italy	45,960	64,100	3%	29,593	23,824	2%
Switzerland	48,027	46,126	2%	12,367	13,308	1%
Netherlands	48,757	45,968	2%	48,210	28,416	2%
Austria	22,150	19,650	1%	8,690	11,478	1%
Spain	10,214	14,876	1%	4,381	6,460	1%
Australia	12,800	14,777	1%	120,804	143,345	12%
Sweden	21,048	14,317	1%	13,453	3,821	-
Ireland	13,472	13,171	1%	5,010	4,938	-
S. Korea	9,593	12,857	1%	4,086	4,410	-
All Others	158,077	188,374	9%	161,059	309,045	25%
TOTALS	1,696,173	2,088,287	100%	1,140,936	1,225,773	100%

METHODOLOGY

There has been a substantive change in the statistics since the publication of the 1976 report. The Census Bureau's changes in the commodity code schedules will have caused some shift in the commodity mixes of seven-digit items, as they are converted to Schedules A and E and summarized into the various four-digit Schedules A and E report codes. For these reasons, caution is suggested for any person considering the use of this report to do trend analyses at the commodity level.

Source Data

Basic export data for 1978 and 1979 were taken from the Department of Commerce Census Bureau EA-622 tapes and import data from IA-245 tapes. These tapes identify U.S. foreign trade broken down by country of origin or destination, U.S. Customs District, volume carried, and the commodity code. The information contained on these tapes is: all methods of transportation combined, net quantity and dollar value, vessel shipping weight and dollar value, and air shipping weight and dollar value.

General Specifications

Vessel and air shipment data were subtracted from the "all methods" commodity totals and the remainder is considered to be the dollar value of products or goods, repairs, or value added by repairs, for transport by truck, rail, or pipeline. Specifications for the residual data set that is presumed to be transshipments through Canada were achieved by tabulating our 13 Customs Districts designated as export gateways and by selecting Customs Districts of destination from the United States northern tier for imports, after subtracting the following Census Bureau Schedule C-E and C-I Country Codes and Schedule D, U.S. Customs District Code:

Code	Country	Exports	Imports
122	Canada	X	X
822	Canada	X	N/A
201	Mexico	X	X
899	Unspecified/Miscoded, etc.	X	N/A

Code	U.S. Customs District	Exports	Imports
60	Vessels under their own power or afloat	X	X
70	Shipments individually valued under $251	X	X
80	Mail Shipments	X	N/A

Mail shipments are separately classified only for exports. Mail shipments for imports are substantially factored out by elimination of those data that do not show the same code for District of Entry as for District of Unloading.

PROCEDURES

The estimated shipping weight was calculated using the following steps:

1. Accumulate total of the vessel weight and dollar value for each commodity that is on the foreign trade export or import files.

2. Divide each accumulated commodity weight total by the accumulated dollar values to obtain the individual commodity factors.

3. Select data records for the Canadian Diversion export or import file as discussed in the above General Specifications.

4. Subtract the accumulated commodity sums for Vessel or Air shipments for the All Methods of Transport accumulated commodity sums on each file to determine the Canadian transshipment dollar values.

5. Multiply each commodity's dollar value by the factor obtained in the second step to obtain estimated long tons.

The commodity data were further refined for the purpose of this report by eliminating such elements as self-propelled aircraft, repairs, imported diamonds and gemstones, miscellaneous low value shipments, and salvage, as well as certain reimports and returned goods.

SEP 10 1981

FOUNDED 1933

National Association of Stevedores

1899 L STREET, N.W. · WASHINGTON, D.C. 20036 · 202 296-2810-2811

September 8, 1981

Honorable Harrison A. Williams, Jr.
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Re: Hearings on S. 1182

Dear Senator Williams:

This is in response to your letter of July 7, 1981, and the attached 12 questions sent to me as Executive Director and General Counsel of the National Association of Stevedores. The responses to those questions as they pertain to the National Association of Stevedores are the following:

Questions 1-4: My testimony at page 2 referred to expenditures for safety programs of $15 to $25 million by members of the National Maritime Safety Association (NMSA) not the National Association of Stevedores (NAS). The testimony to which I referred appears at pages 327-372 of Part 2 of Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act, Subcommittee on Compensation, Health and Safety, Committee on Education and Labor, House of Representatives, 95th Congress.

Member companies of the NAS are also members of NMSA along with other maritime employers, and industry safety programs and procedures are within the purview of NMSA, not the NAS. For further information concerning NMSA's activities you should contact Frank A. Scanlan, Esquire:

National Maritime Safety Association
2900 Two Girard Plaza
Philadelphia, PA 19102
212/569-2333

Questions 5-7 and 12: These questions do not pertain to the National Association of Stevedores and can be answered by the witnesses for Newport News Shipbuilding Company.

Question 8: "Occupational disease" is not defined in the LHWCA. The only reference to "occupational disease" is in section 902(2) which includes it in the term "injury":

> "(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment."

It has been held that "occupational disease" must be limited to those diseases which result from working conditions peculiar to the employment and caused by hazards greater than those involved in ordinary living. In order to determine what a compensable occupational disease is one must first look to the type of employment involved and the environment in which it took place.

Assuming a compensable occupational disease the next problems are (1) when was the "date of injury" for notice purposes, and (2) when was the date of injury for calculating the average weekly wage. Still another problem is which employer should be liable if the employee, like most longshoremen, worked for more than one employer in the same type of employment. Case law provides that the last employer in whose employment the worker was exposed to the stimuli is responsible for the entire claim. The Act itself provides no answer to these questions.

Question 9: It is our understanding that insurance premium rates for LHWCA coverage are not established by either the National Council on Compensation Insurance nor state rating bureaus. Premium rates are proposed by NCCI and rating bureaus to the various state insurance commissions or regulatory authorities. These proposals are subject to challenge and review by interested parties. The premium rate levels are either approved or disapproved by the various state insurance commissioners or regulatory authorities. Attached is a listing of the states in which various rating bureaus are licensed to operate. In all states the state authority has the final say in the rate levels.

Question 10: We do not believe that competitive pricing of workers' compensation (LHWCA) coverage in and of itself will reduce costs to stevedore companies, if "competitive pricing" means doing away with manual rates approved by state insurance regulators. The problem with which the NAS members are now faced is that there is no real competition for their insurance portfolio as most insurance carriers don't want to underwrite an LHWCA risk at any price. Also, most employers do not purchase insurance solely on premium cost. Other factors, such as claims service, safety engineering, general knowledge of the industry and its risks must be taken into account and evaluated. A higher premium may ultimately be selected because of the overall capabilities and experience of the insurance carrier.

Prior to the 1972 amendments there was rate competition and employers were self-rated on their own experience and could purchase retrospective insurance policies. If the Act is amended so as to be insurable and affordable it is expected that competition for coverage will be restored. If the Act is not amended there will not be any competitive pricing by the insurance industry.

Question 11: As to the stevedoring industry, S. 1182 does not return LHWCA coverage to the "water's edge". S. 1182 would extend jurisdiction to the "point of rest" so as to provide LHWCA coverage to all amphibious longshoremen employed in gangs directly involved in loading or unloading vessels. State coverage would apply to all workers landward of the "point of rest" whose daily employment does not require them to go on board vessels in the course of their employment.

Prior to 1972 an injured employee was entitled to LHWCA benefits only if "recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State Law" (Sec. 3(a). The legal "confusion" was about the extent of jurisdiction of state law and not the scope of the federal LHWCA. Out of that situation the Supreme Court created the "maritime, but local" rule by which it extended state law in certain instances into the navigable waters; not the LHWCA onto the land. State law was primary, and the federal LHWCA was to be invoked only when state law could not. As the law now stands as a result of the Supreme Court's decision in Sun Ship, Inc. v. Pennsylvania, 100 S. Ct. 2432(1980) neither law is primary for injuries occuring on land and the injured worker may accept the higher of federal and state compensation benefits. As a result, there is more confusion now than there was prior to 1972, and S. 1182 would do much to eliminate it.

If you require further information we will be pleased to furnish it.

Sincerely yours,

Thomas D Wilcox
Thomas D. Wilcox
Executive Director and General Counsel

TDW/pf

Enclosure

maintain and increase its objectivity. In the final analysis, the quality of administration is the most important influence on the equitability of the workers' compensation program, and a fundamental determinant of insurance costs.

We trust that the information and comments offered herein will be of assistance to the Committee.

EXHIBIT 1

WORKERS' COMPENSATION RATEMAKING ORGANIZATION

I. THE NATIONAL COUNCIL IS A LICENSED RATING ORGANIZATION FOR WORKERS' COMPENSATION AND EMPLOYERS' LIABILITY INSURANCE IN THE FOLLOWING JURISDICTIONS:

Alabama
Alaska
Arizona
Arkansas
Colorado
Connecticut
Dist. of Columbia
Florida
Georgia
Idaho
Iowa
Kansas
Kentucky
Louisiana
Maine
Maryland
Mississippi
Missouri
Montana
Nebraska
New Hampshire
New Mexico
Oklahoma
Oregon
Rhode Island
South Carolina
South Dakota
Tennessee
Utah
Vermont
*Washington
*Wyoming

* Federal Coal Mine Health and Safety Act benefits only.

II. STATES WITH AN INDEPENDENT LOCAL RATING ORGANIZATION:

California
Delaware
Hawaii
Illinois
Indiana
Massachusetts
Michigan
Minnesota
New Jersey
New York
North Carolina
Pennsylvania
Virginia
Wisconsin

III. RATES PROMULGATED BY STATE AUTHORITY:

Texas

IV. STATES WITH EXCLUSIVE STATE FUND:

Nevada
North Dakota
Ohio
Washington
West Virginia
Wyoming

HARRISON A. WILLIAMS, JR., N.J., CHAIRMAN
JENNINGS RANDOLPH, W. VA.
CLAIBORNE PELL, R.I.
EDWARD M. KENNEDY, MASS.
GAYLORD NELSON, WIS.
THOMAS F. EAGLETON, MO.
ALAN CRANSTON, CALIF.
DONALD W. RIEGLE, JR., MICH.
HOWARD M. METZENBAUM, OHIO
RICHARD S. SCHWEIKER, PA.
JACOB K. JAVITS, N.Y.
ROBERT T. STAFFORD, VT.
ORRIN G. HATCH, UTAH
WILLIAM L. ARMSTRONG, COLO.
GORDON J. HUMPHREY, N.H.

LETITIA CHAMBERS, STAFF DIRECTOR
STEVEN J. SACHER, GENERAL COUNSEL
MARJORIE M. WHITTAKER, CHIEF CLERK
DAVID A. WINSTON, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON LABOR AND
HUMAN RESOURCES
WASHINGTON, D.C. 20510

August 7, 1981

Mr. Thomas D. Wilcox
Executive Director and
General Counsel
National Association of Stevedores
1899 L Street, N.W.
Washington, D.C. 20036

Dear Mr. Wilcox:

In June 1981, you appeared before the Senate Labor Subcommittee and presented testimony in the Longshoremen's and Harbor Workers' Compensation Hearings. Enclosed with this letter you will find a set of questions based on issues raised by your testimony. Please answer these questions as thoroughly as possible and provide supporting materials as appropriate. If any aspect of a question is not addressed in your answer, explain clearly the reason for this omission.

Your prompt response is appreciated, and in any event, your answers should be mailed no later than two weeks from the date of your receipt of this letter.

Sincerely,

Harrison A. Williams Jr.

Harrison A. Williams, Jr.

HAW/11
Encl.

FOLLOW-UP QUESTIONS TO: TOM WILCOX (EXECUTIVE DIRECTOR AND GENERAL COUNSEL, NATIONAL ASSOCIATION OF STEVEDORES)

1. In your testimony before the Labor Subcommittee during the Longshoremen's and Harbor Workers' Compensation Hearings (June 1981); you asserted that $15 to $25 million has been spent on safety by the National Association of Stevedores. Describe in detail the ways in which the Association allocated these funds to promote safety.

2. Describe in detail the ways in which the Association is working to protect workers from the occupational hazards of asbestos exposure.

3. Describe in detail the ways in which the Association is working to protect workers from the occupational hazards of toxic chemical exposure.

4. Describe in detail the ways in which the Association is working to protect workers from occupationally-induced hearing loss.

5. State the construction schedule for the USS Nimitz, specifically noting the date on which construction was begun, the original completion date as specified by contract, the number of extensions of the original completion date as modified by subsequent contractual arrangement, and the current expected completion date.

6. State the original anticipated cost of the USS *Nimitz* and, as of this date, the anticipated final cost.

7. Describe the occupational safety and health conditions attending the construction of the USS *Nimitz*, providing specific figures for the number of deaths due to work-related injuries in each year of construction, the number of workers permanently and totally disabled as a result of work-related injuries in each year of construction, and the number of safety and health violations cited by OSHA inspectors and the fines paid therefor, in each year of construction.

— 8. During the course of your testimony before the Subcommittee, you stated that the current state of the law prevents employers and insurers from being certain of the definition of "occupational disease" and from ascertaining when the onset of disease has occurred. What is the basis for this assertion?

— 9. List those states in which members of the Association have premium rates established by the National Council of Compensation Insurance and/or state rating bureaus.

— 10. In your opinion, will the introduction of competitive pricing of workers' compensation coverage reduce costs? State the reasons for your opinion.

— 11. Under proposed legislation, S.1182, the "return to the water's edge" would be instituted. If such legislation is passed, what would prevent the state of the law from returning to the level of confusion existing prior to 1972 ?

12. State whether productivity has increased in the Newport News shipyards in each of the last eight (8) years. Also specify the percentage by which it has increased or decreased in each of those years.

Senator NICKLES. I appreciate your statement, and I am very appreciative of your association and others that are going to try and do all that they can to clean up whatever abuse.

Before I ask you individual questions, today I am going to ask all panel members to give their statements, and then I can ask the questions of you as a panel. The panels are grouped together for that purpose.

Our next guest is Dennis Lindsay, for the Master Contracting Stevedore Association of the Pacific Coast, Portland, Oreg.

Welcome, and we appreciate your coming and joining us today.

Mr. LINDSAY. Thank you, Senator. I have a watch, and I will keep my remarks within the 5 minutes.

Senator NICKLES. Thank you.

Mr. LINDSAY. Our association consists of the firms which provide the stevedoring and the terminal services on the west coast at all the principal ports—Seattle, Portland, Los Angeles, San Francisco.

What distinguishes us, I believe, from the rest of the country is that our work force is the International Longshoremen & Warehousemen Union, whereas on the east coast and the gulf and the Great Lakes, stevedores are dealing with the ILA.

This particular work force, the ILWU, so you have it in mind, consists of about 9,700 active longshoremen. I think the statistics show that they earned an average wage of $33,000 or better last year, for the men who worked 1,600 hours or more.

I would call your attention to the fact—I think you indicated it when you opened the proceeding today—that your hearings have not gone unnoticed by the ILWU on the west coast. In fact, they engaged in Los Angeles in a complete work stoppage or strike, whatever you want to call it, from Monday 8 a.m. until Tuesday 8 a.m., and accompanied this with a TV-media demonstration. The basis of it, as far as I could tell from the writings I have seen, is that they are protesting S. 1182 as what is being called vicious legislation.

I am at a little bit of a loss to understand this, but we are here today to let you know that, from our study of the bill, we strongly support it, and we believe it is long overdue.

It is hard to realize that our small band of employers has been before the Congress four times now. Back in 1977, we appeared in front of the House in long hearings; in 1979, we were there again, and last fall, in front of Senator Williams, we appeared before your full committee, all three being oversight hearings. And here we are again today, going through it again.

I think if you or your staff were to review—and I know some of your staff have reviewed the record of the hearings—we are going to sound like a broken phonograph record. We just keep playing the same tune again and again. I am sorry we cannot say it much differently or slice it any other way, but we have had basic problems with the act since 1972. We have been raising it ever since we could; and we are here again, raising these same problems.

We have spelled them out in detail, of course, in our statement. Here today, I think the best way is to break out five broad problem areas that we think require legislative attention and which we feel S. 1182 gets at and tries to remedy.

Let me put these problem areas this way: insurability, medical, litigation, coverage, and finally, benefit entitlements.

First, insurability. This is basic to any compensation system, because we have got to be able to price our services, particularly in the stevedoring or terminal business, where you must know how much compensation costs. Our people are not insured privately at the moment; we are not able to get it. We are either self-insured, or to the extent that we have an insurance company that fronts for us, we are in effect paying on a cost-plus basis.

There are lots of reasons for that, and many witnesses will talk about it. But S. 1182, as far as we are concerned—and we are consumers—we think it gets at it. It is going to enable us to get some insurance, particularly in the reinsurance field, by putting a cap on the annual escalation, by putting a cap on the death benefits, by the way it separates scheduled and unscheduled permanent partial disability. These are about four different ways that S. 1182 really meets the insurability question and should make it available to us.

Medical care. Here, the basic problem, as far as we are concerned, is this so-called free choice. It is a wonderful word, but it has not worked, in our experience. I think it has polarized our communities into plaintiffs' camps and defendants' camps, each with their own set of doctors. We think we really need to return to the panel system. We need to get a reasonably disinterested set of doctors appointed by the Department of Labor. We like the provisions in S. 1182 with respect to independent medical examinations.

On litigation, there is way too much of it. The 1972 amendments were to put an end to the third-party suits. Instead, we have got this whole mass of administrative hearings and argue about the applicability of the act and the rates, et cetera, in front of administrative law judges and then up to the benefits review board.

I think S. 1182 does a lot to cut down this. It has got much clearer definitions and criteria which reduce the scope of the arena for controversy. Your medical provisions are going to cut this down as will your provisions on settlement. You are going to be able to get a settlement where you cannot do it now. You also have other provisions with time limits on them. And everybody knows in an adversary system that you cannot try all the cases; if it is to be solved, they have to be settled. I think this bill provides a mechanism for settling them.

On coverage, this is, in our particular case, unlike other witnesses, not a big item. Whether we are under the old act or we are under your definition, the bulk of our people are still going to be covered. What is important to us is that coverage is the bugaboo that makes insurance not available to us. And if you come at it, and you handle this coverage question as you have in your definition, then insurance should be available to us.

One point we would make that your bill does not take up is the overlapping situation whereby, as a result of Supreme Court decisions, a person can get State compensation, and then go and get the Federal compensation, on top of it, as sort of supplemental to it.

We have some suggestions in our statement, but at the very least, provisions should be written into the law that if you are going to have this overlapping situation, you should get a credit for what you pay out on one before you go into the next one.

Finally, on this benefit entitlement, here we see a compensation act, again philosophically, as something that is supposed to return a person back to work; and second, you are not supposed to make a profit on it. And yet we see that the provisions in this act, where you get the permanent partials as long as you live, the unrelated death benefits, no offsets. We see a very expensive system. Your bill comes at this by in effect making it a true wage replacement system and requiring that the benefits only be paid until the normal retirement age. You have also put in provisions for offsetting, and when they get unemployment, when they get social security, when they get the union pension—you do not do it all at the expense of compensation. To the employers, this is a very expensive item. So we are talking cost here, from our point of view, as well as philosophy.

Finally, I should call to your attention, and there has been considerable discussion here today about Canada and diversion, and here is an article that perhaps you ought to put into your record from the "American Shipper" from June of 1981, talking about—the heading reads, "Vancouver Spending $51.5 Million To Pull Trade Away From Seattle." I think that is an interesting note on which to conclude the testimony.

Thank you, Senator.

Senator NICKLES. We will enter that into the record.

[The prepared statement of Mr. Lindsay follows:]

STATEMENT OF DENNIS LINDSAY

COUNSEL FOR THE MASTER CONTRACTING STEVEDORE
ASSOCIATION OF THE PACIFIC COAST, INC.

BEFORE THE SUBCOMMITTEE ON LABOR
OF THE SENATE COMMITTEE ON
LABOR AND HUMAN RESOURCES
OF THE UNITED STATES SENATE

HEARINGS ON S. 1182

Washington, D.C.
June 17, 1981

My name is Dennis Lindsay. I am the senior partner in the law firm of Lindsay, Hart, Neil & Weigler, of Portland, Oregon. I appear as counsel for the Master Contracting Stevedore Association of the Pacific Coast, Inc.

West Coast Stevedore Industry

The Association is composed of the firms providing stevedoring and terminal services at the principal ports on the West Coast -- San Francisco and Oakland, Los Angeles and Long Beach, Seattle, and Portland -- and almost all other ports in the West Coast states of California, Oregon and Washington.

Members of the Association employ a work force of approximately 9700 longshoremen and clerks, all members of one union, the International Longshoremen's and Warehousemen's Union (ILWU), which has a coastwise labor agreement. During 1980, this work force put in over 18 million man hours and was paid over $331 million in wages (virtually all by the members of the Association), the average annual earnings amounting to almost $33,000 for a longshoreman who worked 1600 or more hours. Additionally, employers contributed over $121 million towards employee benefit plans.

The Cost of Longshore Act Coverage

If one were to assume that Longshore Act primary insurance was available and that it could be secured at current manual rates of approximately $39 per $100 of payroll, then the direct labor payroll of the ILWU of $331 million would generate a premium of more than $129 million, more than $13,000 per employee.

This extraordinary expense -- more than the cost of all negotiated fringe benefits -- must be reflected in the charges quoted Association customers. Where commodities, such as agricultural products, must be hand stowed, the charge for compensation insurance -- over $7 per longshore hour -- very substantially increases the delivered price of the products themselves, in some instances pricing domestic products out of the market and forcing prospective purchasers to seek sources of supply in other countries.

Even in those instances where highly efficient machinery can be used, compensation costs foreclose effective competition with Canadian stevedores, as witness the recently released study, "U.S. Exports - Imports Transshipped via Canadian Ports," U.S. Department of Commerce, Maritime Administration, which shows significant increases in exports and imports transshipped via Canadian ports for the Seattle Customs District from 1976 to 1979.

S. 1182 would do much to lessen the currently excessive costs of providing appropriate compensation benefits to waterfront workers and to assure that more goods and services are not priced out of a very competitive world market.

Necessity for S. 1182

The Longshore Act has been under close scrutiny for nearly nine years. As a framework within which private industry must work, the Longshore Act has been found seriously wanting.

Three sets of congressional hearings -- two by the House of Representatives Subcommittee on Labor Standards in 1977 and 1979, and one by the Senate Committee on Labor and Human Resources in 1980 -- have identified those portions of the Longshore Act which so greatly and unnecessarily have increased waterfront compensation costs and the prices of those goods produced or handled by maritime workers.

Additional impacts of current Longshore Act deficiencies were documented by the recent hearings of the Senate Permanent Subcommittee on Investigations.

The Longshore Act is greatly out of balance, containing much language and many provisions which combine to threaten the entire compensation program and the continued vitality of the maritime industry.

S. 1182 recognizes that the Longshore Act is too slow, too expensive, and too uncertain to continue as the compensation system for a substantial number of workers. The need for change and the urgency of that need have been documented. S. 1182 meets those needs and merits enactment.

Major Problems Remedied By S. 1182

In prior testimony submitted to the House Subcommittee on Labor Standards of the Committee on Education and Labor in November, 1979, and to the Senate Committee on Labor and Human Resources in September, 1980, the Association documented a broad range of Longshore Act problems and suggested a number of potential solutions.

The many identified problems may conveniently be grouped into five major reasonably distinct categories, each meriting legislative attention and each addressed by S. 1182:

> (1) Insurability: Potential liabilities are too uncertain for reasonable forecasting, forcing many insurers out of the market and causing those who remain and those companies required to substantially self-insure their own risks to include a "worst case" cost projection in the premiums or charges quoted their respective customers.
>
> (2) Medical Care & Impairment Rating: Current provisions regarding medical care have polarized waterfront communities into "claimant" and "employer" camps; in so doing, they have increased the duration and costs of medical treatment beyond reasonable bounds and have provided widely disparate medical impairment ratings.
>
> (3) Litigation and Settlement: Current provisions discourage settlement and encourage the litigation that compensation systems in general and the 1972 Amendments in particular were designed to replace.

(4) Coverage: Current imprecise jurisdictional language permits many waterfront workers to choose among and requires their employers to insure a broad range of currently overlapping but properly exclusive remedies for work-related injury and disease.

(5) Benefit Entitlement: Current provisions discourage claimants from returning to work, encourage exaggeration, and, by pyramiding compensation benefits with retirement and Social Security benefits, enable older employees to "profit" from their injury.

A consulting firm, Cooper & Company, retained by the former Assistant Secretary of Labor, Donald Elisburg, to investigate the charges made against the Act and its administration by the Department of Labor, reported back that:

> ". . . Serious problems exist. Inordinately high accident rates are partially compensated for by high benefits, both of which cause concomitant high costs for insurance. The issue is further compounded by lack of clear jurisdiction of the Act which frightens underwriters and tends to tighten the availability of coverage and/or create pressure for increased rates. These problems can no longer be ignored if a viable workers' compensation program and a viable maritime industry are to be maintained. . . ."
>
> (Phase I Draft Final Report, Vol. I, p. VII-27, emphasis in original)

S. 1182 addresses each problem category. Its responsiveness to the problems documented in previous Congressional hearings is demonstrated throughout the balance of this Statement.

Insurability

Premiums charged by insurers must be adequate to pay estimated future losses. Self-insured employers must also estimate those future expenses if they are to be able to quote rates sufficient to cover all costs of operation and earn the profit necessary to continued existence. The current version of the Longshore Act makes accurate future estimates virtually impossible.

Any estimate of future liability must recognize and reflect a broad range of variables, including the ages and life expectancies of the worker and spouse, the likelihood that the spouse will remarry in the event of the worker's death, the prospect that the injury will itself worsen and alter otherwise accurate mortality estimates, and -- in cases involving the Longshore Act -- the probable impact of future inflation.

Section 10(f) of the Act requires annual adjustments to the amounts being paid permanently and totally disabled workers and death benefit recipients. The benefit increase is tied to annual increases in the national average weekly wage. Since 1972, those increases have ranged between 6.26% (1974) and 8.05% (1978). The impact of this seemingly small variation can be enormous.

The statement submitted by the Texas Employers' Insurance Association, Employers' Casualty Company, and Employers' National Insurance Company to the Senate Labor and Human Resources Committee on September 16, 1980 was accompanied by several charts demonstrating the variation in total benefits caused by a 1.5% variation in projected escalation rates. At the rate payable to a fairly typical West Coast longshoreman, a 1.5% variation would cause a company forecasting the lower rate to underestimate the amounts payable over a 30-year period by approximately $45,000. By the 40-year point, that mistake would cost $120,000. If the mistake occurred in a case involving a young worker, benefit payments could well continue for 50 years, at which point the dollar amount of the error would approach $300,000. One error will erase the profits from many projects.

Even former Assistant Secretary of Labor Donald Elisburg had to acknowledge the difficulty of future liability projections in a letter to Congressman John Erlenborn:

> ". . . Trying to predict the future liability of the Fund is a most difficult problem for several reasons:
>
> 1. Employees or survivors receiving compensation for permanent total disability or death benefits are entitled to increased bene-

> fits each year. The size of this yearly increase is determined by the percentage increase in the national average weekly wage as defined in the Act. The rate at which the national average weekly wage will change, either increase or decrease, is most difficult to predict. Accordingly, the changes in benefit amounts in the appropriate cases for which the Fund is liable cannot be reliably predicted."

Armed with an annual assessment authority, Assistant Secretary Elisburg had only to look one year into the future. Insurers and self-insured Association members must look much further and, unable to return to their insureds and customers a decade hence for additional monies, must establish adequate premiums and cargo handling rates or face substantial future losses.

The 1972 amendments caused the premium and rate-setting procedure to become a distinct gamble. Those insurers who previously competed for Association business concluded that the odds were unacceptable and withdrew from the Longshore Act market. Association members were forced into various forms of self-insurance and to themselves underwrite the risks of inflation. These risks can be covered only by increased cargo handling rates. Measured against the rates prevalent in Canadian ports, no further room for increase exists. Indeed, the competitive disadvantage experienced by United States stevedoring companies - a disadvantage almost completely attributable to workers' compensation costs -- is already substantial.

Stevedore companies turned to self-insurance when primary insurance premiums -- necessarily based on "worst case" future projections -- became exorbitant. Shippers are now making a very similar choice, turning to Canadian alternatives in the Northeast, Northwest, and Great Lakes regions. Mexican port and rail facility construction promises the same insurmountable competition for Gulf and West Coast stevedores. Productivity increases cannot overcome the tremendous disparity in the benefits payable to United States longshoremen when compared to their Canadian and Mexican counterparts. Cargo handling rates must be brought into competitive alignment. That can occur only if potential Longshore Act expenses are lessened and made reasonably predictable.

Various provisions of S. 1182 focus on the insurability problem and vastly improve the necessary ability to predict future expenses with reasonable accuracy (references are to sections of S. 1182):

(1) By assuring that annual increases in benefits for permanent total disability and for death may not exceed 3% (Section 10(b)(2)).

(2) By curing the drafting defect in the 1972 amendments of permitting survivors to receive more in benefits than the deceased (Section 4(a)).

(3) By eliminating the inappropriate life insurance -- "unrelated death" -- benefits added in 1972, and limiting death benefit entitlement to the survivors of employees who die of work-related causes (Sections 8(c) and 9(a)).

(4) By equalizing the maximum benefits for permanent partial disability, whether for scheduled or unscheduled injuries (Section 14(f)).

(5) By precluding double recovery for the same permanent partial disability on a scheduled award and on an unscheduled basis (Section 8(c)).

The annual benefit escalation limitation provision is probably the single most important element of S. 1182. Without that limitation, the dire prospects forecast by Cooper & Company to the Department of Labor are very likely. The limitation on annual benefit escalation is essential to a "viable workers' compensation program and a viable maritime industry."

Medical Care and Impairment Rating

Nine years' experience under the provisions regarding medical care in the 1972 Act have resulted in polarizing waterfront communities into "Claimant" and "Employer" camps and have increased the duration and costs of medical treatment beyond reasonable bounds. They have had a similar negative and costly effect on medical impairment ratings.

The 1972 Amendments coupled two provisions long sought by labor: Vastly increased benefits and complete "free choice" of physicians. With all economic incentive to resume work removed by the benefit increases and with insurers and employers foreclosed from any significant role in the selection of physicians and the control of medical care and expense, substantial responsibilities fell upon the Secretary of Labor.

Despite express Congressional authorization to designate physicians authorized to provide medical care to Longshore Act benefit recipients, the Secretary of Labor has refused to exercise that responsibility for nine years. Treatment and authorizations for continued time loss are now often provided by family physicians unfamiliar with the nature of their patients' work and, sometimes, wholly without appropriate medical training or experience. The problem is worsening as occupational disease claims become more and more frequent. A large part of the problem would be relieved by designating "authorized" physicians and by limiting that designation to Board-certified specialists proficient in treating the type of injury or ailment presented by the worker.

In the absence of means for correcting inadequate medical care and effective routes to resolving disputed medical questions, the substitution of "free choice" for the former employer "panel" and the substantial increase in benefits greatly increased the costs and inefficiencies of delivering Longshore Act benefits. In addition, the "free choice" amendment of 1972 has had another distinct and adverse impact on the claims handling process.

The "free choice" provisions caused in almost every locality a division of the medical community into "claimant" and "employer" factions and therefore broadened the range of dispute and hindered the opportunity for settlement. Typical proceedings involve a "claimant's physician" who describes his patient's condition as severe enough to preclude even the lightest work and an "employer's physician" who reports the claimant ready to resume his regular duties. The absence of any effective "independent medical" provisions has required that these more frequent medical disputes be resolved in an adversary context not well suited to the issues presented.

The provisions in Sections 5(a) and (b) in S. 1182 go far to correcting the problems created by the 1972 amendment process. "Free choice" remains a practical reality. S. 1182 simply assures that the choice may be made only from properly authorized physicians and further assures that the Secretary will perform his function by extending a "nominating" power to the various employers.

The injection of an appropriately balanced "free choice" into the physician selection process and the introduction of reasonable "independent medical examination" provisions will go far to assure that employees receive the best possible medical care and that disputes regarding medical issues are reviewed by truly independent and expert physicians capable of providing the impartial opinions needed for informed closure.

The current "medical care" battles in Southern California demonstrate the polarization of the local medical community. This polarization was caused by the combination of high benefits, free choice of physicians, and inadequate provisions regarding independent medical evaluation of disputed issues. S. 1182 is needed to correct that situation and assure that it is not repeated in all other port cities.

Litigation and Settlement

The 1972 amendments were designed to speed the delivery of increased compensation benefits to injured workers and to reduce

> ". . . the social costs of lawsuits, the delays, crowding of court calendars, and the need to pay for lawyers' services. . . ."
>
> (S.Rep. 92-1125, p. 5)

Those goals have not been met. Lawsuits -- in the form of hotly contested compensation proceedings -- abound. Substantial delays are the rule, not the exception.

We have not been able to secure accurate statistical data from the Department of Labor as to the number of controverted claims (a) which are disposed or settled at the Deputy Commissioner level, (b) which proceed through a hearing and decision by the Administrative Law Judge, (c) which are appealed to and decided by the Benefits Review Board; nor do we have data as to the time delays involved in each step of this adjudicatory process. However, from our own experience we can unequivocally state that more and more claims are being litigated rather than resolved at the Deputy Commissioner level.

Much of the blame for this increased litigation and time delay must be ascribed to the 1972 amendments. As in any adversary adjudicatory system, the clearer and more precise the applicable criteria for resolving any dispute, the fewer the areas of possible dispute. S. 1182 will eliminate the areas for possible dispute by providing clearer statutory criteria and, within statutory time limits, provide a more sharply defined adjudicatory process. The injured employee will receive his compensation benefits as expeditiously as possible at the least possible economic cost to the system.

Some of the provisions of the Act that encourage litigation rather than promote settlement and disposition of controverted claims can best be demonstrated by an example.

> A 45-year old registered longshoreman earning approximately $25,000 per year in that trade also earns between $5,000 and $45,000 as a fisherman during the short Columbia River and Alaska fishing seasons. After the close of successful seasons in 1980, and return to longshore employment, he was disabled by a heart attack. Bypass surgery was performed. Recovery continued until the worker was able to resume both employment activities shortly before the first of the 1981 fishing seasons.
>
> The worker filed claim for Longshore Act benefits, alleging that his compensation rate should be based on his total 1980 earnings of $60,000, that the medical expenses already paid by the off-the-job insurer were properly chargeable to his employer and asserting that his earning "capacity" was reduced by 50% -- the medical "impairment" estimate of the treating physician, almost all of which was attributable to the underlying disease. Voluntary benefits were paid until the return to work.
>
> Faced with existing statutory presumptions, current methods of computing the claimant's "average weekly wage", and a desire to guide the parties toward compromise and settlement, the Deputy Commissioner concluded that all earnings should be included, that the attack was compensable, and that the claimant's "earning capacity" has been decreased by 20%. Based on those conclusions, the Deputy Commissioner recommended payment of approximately $13,000 in temporary total disability benefits, all medical expenses, a continuing lifetime weekly award of $145, and rejected the employer's request for Section 8(f) relief.

Both parties rejected the recommendation, the claimant because he continued to seek permanent partial disability benefits of $300 per week (40%) and the employer because of a conviction that formal hearing would result in an award of Section 8(f) relief and a limitation of its liability to an amount far below that reflected in the recommendations. The claimant then suggested settlement for a lump sum of $75,000, plus all incurred medical expenses and a "reasonable" attorneys' fee. Despite a potential exposure far exceeding that facing the direct employer, the guardians of the Fund refused to participate in any negotiations. Formal hearing followed.

The Administrative Law Judge concluded that the statutory presumption and the views of the claimant's treating physician were not rebutted by a Board-certified cardiologist's testimony that the attack was unrelated to any work activities and simply represented the natural result of advancing coronary artery disease and found the attack compensable. Faced with the current provisions of Section 10(c), the Administrative Law Judge determined that the proper compensation rate should be based upon all earnings - whether obtained from longshoring or fishing. Despite proof that the claimant's post-recovery earnings had exceeded the 1980 figures, the Administrative Law Judge accepted the claimant's argument that Section 8(h) required entry of an order reflecting possible future deterioration of the claimant's medical condition and assessed an "earning capacity" impairment figure of 15%. Despite the payment of voluntary benefits, attorneys' fees at an hourly rate of $100 were assessed against the employer in favor of the claimant's attorney. Because the arteriosclerotic condition was both well documented and the primary -- if not the sole -- cause of the infarction, Section 8(f) relief was determined appropriate.

The final results of the proceeding:

(a) Claimant received approximately $13,000 in temporary disability benefits for a period between fishing seasons in which he would have grossed only $10,000 had he continued his usual work;

(b) The off-the-job insurer that initially paid for the bypass surgery (primarily if not totally designed to repair the effects of the underlying disease) was reimbursed its expenses of $10,000 and - for all practical purposes - relieved from all further liability for the claimant's heart condition;

(c) The claimant received assured lifetime weekly benefits of $120 for potential permanent economic disability;

(d) The claimant's attorney received $4,000 for 40 hours of work;

(e) The employer was determined responsible for approximately $34,000 for temporary compensation, medical benefits, and the initial 104 weeks of permanent partial disability, plus the amounts due his own and the claimant's attorney and the unascertainable figure for future medical expenses; and

(f) The Special Fund was determined responsible to pay continuing weekly benefits for the balance of the claimant's life expectancy, a total amount approximating $200,000.

Although few would contend that the outlined results in any way reflect the wage-replacement purposes proper to any workers' compensation system, no one familiar with the system would question either the accuracy of the hypothetical example or the frequency of its repetition.

Under the current version of the Longshore Act, any ailment experienced by a "maritime" worker will be held work related and generously compensated despite the absence of any current impact on the worker's earning power unless the employer disproves the connection between the work and the ailment. Faced with such favorable chances for recovery, and aware that the proceedings will impose no expense on them, claimants reject reasonable settlement efforts. Even in those cases where claimants are willing to consider settlement, the Special Fund's current unwillingness or inability to participate in negotiations precludes that route to closure in many cases and, once again, requires resort to the expensive litigation process.

The provisions in S. 1182 would substantially change the example outlined above: (a) The claimant's compensation rate would reflect only earnings from longshoring -- the only earnings includable in the insurer's premium base or the employer's cargo handling rate (Section 2(c)); (b) Entitlement to permanent partial* disability benefits would be postponed until claimant's actual earnings fell below the appropriate pre-injury figure (Section 8(b)(4)); (c) The determination of whether the infarction was or was not properly compensable would rest upon a balancing of credible medical opinion, aided by increased opportunities for truly independent medical evaluation and achieved without the injection of artificial statutory presumptions (Sections 5 and 12). Finally, all three interested parties -- the claimant, the employer, and the Special Fund -- would have incentive and authority to negotiate and achieve a settlement acceptable to all (Section 8(e)).

Besides the above provisions in S. 1182 which would directly apply to the resolution of the claim presented in our example, there are many other provisions in S. 1182 which will serve to discourage litigation and promote the more expeditious and economical resolution of claims, for example, the more sharply defined provisions dealing with the coverage of the Act (Section 2); the requirement that independent medical specialists evaluate an employee's physical impairment in accordance with the American Medical Association Guides to the Evaluation of Impairment and furnish an opinion as to both any pre-existing physical impairment and any subsequent injury (Section 5(a)); the prohibition against receiving an unscheduled disability award in addition to a scheduled award (Section 6(b)(4)); the clarification of how average weekly wages are to be determined (Section 8); the requirement that a Deputy Commissioner issue a preliminary ruling within 180 days following notice of the employee's resumption of employment or certification of the employee's permanent medical condition, which ruling, if not contested within 30 days, becomes final and not subject to review (Section 11(b)); a limitation on the awarding of claimants' attorneys' fees (Section 19); and extending the existing authority of Deputy Commissioners to approve settlement of death as well as disability cases with a 30-day period to disapprove if grossly inadequate or procured by duress, otherwise the settlement to be final (Section 6(f)).

---

*The example could have been more dramatic. If the worker had not resumed employment, benefit entitlement would have existed even if he refused appropriate vocational rehabilitation. Indeed, benefits for permanent and total disability could have followed formal hearing even if he were engaged in rehabilitation efforts promising excellent future results. S. 1182 would condition continued benefit receipt on cooperation with rehabilitation efforts and prevent any permanent award until the results of those efforts could be measured (Section 8(b)).

Coverage

Jurisdictional issues have little direct impact on stevedore members of the Association. The vast majority of all ILWU longshoremen employed by Association member companies are entitled to Longshore Act benefits for work-related injuries and would remain so entitled even following enactment of S. 1182.

The indirect benefits of the proposed jurisdictional changes in Section 2 of S. 1182 are, however, significant. The Cooper & Company report to the Department of Labor (previously referred to in our Statement) pointed to jurisdictional uncertainties as the primary cause of insurability problems. Correction of those uncertainties by substituting precise jurisdictional language would probably draw many former Longshore Act insurers back into the market and provide a broader range of insurance alternatives to Association members.

However, S. 1182 does not go as far as is necessary to create reasonable jurisdictional certainty. Although precise language relating to the specific occupations named in the Longshore Act is provided, S. 1182 leaves untouched what has become perhaps the most complex of jurisdictional questions -- the overlap among the various remedies potentially available to workers injured on navigable waters while engaged in "maritime but local" activities. The nature of this jurisdictional dilemma and the need for its correction is apparent from the following example.

> Assume a clam-shell operator, employed in dredging operations aboard a work barge owned by his employer. The purpose of the dredging is twofold: The prevention of further flooding in the areas devastated by the Mt. St. Helens eruption and the maintenance of the continued navigability of the Columbia River.
>
> Such a worker is entitled to several potential remedies for employment-related injury or disease:
>
> (1) The right to seek benefits from the appropriate state compensation system;
>
> (2) The right to seek Longshore Act benefits;
>
> (3) The right to seek the benefits of the Jones Act - the traditional remedy of seamen; and

(4) The right to sue his own employer under the general maritime laws of the United States.

With the possible exception of the Jones Act remedy, it is clear that these potential routes to recovery are not exclusive. All are available to the injured worker and must be insured by the careful employer. As the recent decisions of the United States Supreme Court in Sun Ship, Inc. v. Commonweath of Pennsylvania, ___ U.S. ___ (June 23, 1980) and Thomas v. Washington Gas Light Co., ___ U.S. ___ (June 27, 1980) make clear, an injured "maritime" employee may seek benefits under both the applicable State workers' compensation law and the Longshore Act.

Sections 2(d) and 6(g) of S. 1182 will not correct this expensive and unnecessary jurisdictional overlap. More precisely tailored language is necessary to avoid continuation and possible worsening of current jurisdictional confusion. At the very minimum, S. 1182 should provide that an employer should receive a credit for whatever state compensation benefits may have previously been paid to an employee for the same injury or disease.

Benefit Entitlement

The fundamental goals of any workers' compensation system -- be it Federal or State -- are to provide an injured employee (aside from all requisite medical care) with wage equivalent compensation benefits, while temporarily or permanently disabled and to return the employee to work as a productive person as soon as medically feasible. A workers' compensation system is not designed or intended to leave an employee economically better off than he would have been if not injured; and it should not discourage injured employees from returning to work.

The 1972 amendments, when coupled with existing provisions of the Longshore Act, have violated these basic concepts. The manner in which benefit entitlements are structured frequently results in an employee being economically better off as a result of his injury and, moreover, offers incentives often sufficient to discourage him from returning to work.

In its present form, the Longshore Act requires that compensation for permanent total disability be two-thirds of the worker's average weekly wages and that benefits be paid "during the continuance" of such total disability. Likewise, unscheduled permanent partial disability payments are to be paid during the "continuance" of such disability. The quoted phrase has been interpreted to require continued payments throughout the worker's life expectancy, regardless of the fact that "working" and "life" expectancies are not identical.

In its failure to recognize that individuals do retire and, upon retirement, achieve entitlement to other benefits designed to substitute for previous earnings, the Longshore Act has lost sight of the distinctions between workers' compensation programs and other forms of social insurance, such as old-age and unemployment assistance.

The longshore industry on the West Coast has an aging work force. As of December, 1980, there were over 6300 retired ILWU longshoremen as compared with the active work force of approximately 9700. Productivity increases have erased the need to replace each retiring worker. A disproportionately high percentage of longshoremen retire each year. Many more plan to retire within the very near future. As they approach retirement, a substantial number report work-related "injuries", file claims for permanent total disability, and seek to retire with accompanying pension and Social Security benefits.

The extent to which the Longshore Act discourages the older workers' continued employment and encourages a claim for permanent disability is graphically demonstrated by the case of Gordon v. Brady-Hamilton Stevedore Co., OWCP No. 14-34289.

Beginning with a motorcycle accident in the late 1950's, Mr. Gordon developed chronic back problems which in later years were compounded by developing arthritis. As a result, Mr. Gordon became susceptible to back injuries of the "sprain and strain" variety. A number of such episodes occurred, following all of which Mr. Gordon was able to locate suitable work opportunities and resume productive employment.

On December 2, 1977, Mr. Gordon again injured his back and neck. No hospitalization was required and both the treating and examining physicians released Mr. Gordon to resume modified work after approximately 6 months' recuperation. At the time of the work release, both physicians reported that Mr. Gordon's physical impairment was "mild", approximating "14% of the whole man".

Mr. Gordon attempted to resume his usual work as a crane operator, concluded that he "just couldn't handle it", and, instead of seeking other lighter work (as he had done when his income was stopped during a strike in 1977), asserted entitlement to benefits for total disability.

The Deputy Commissioner concluded that the injury had caused a 35% decline in Mr. Gordon's earning capacity and, inferentially at least, determined that Mr. Gordon's decision to retire was in large part voluntary. After formal hearing, the Administrative Law Judge found Mr. Gordon permanently and totally disabled, awarding initial weekly benefits of $338.99.

In the year preceding his injury, Mr. Gordon's total gross income was $26,441.48, all of which was fully taxable. In comparison to those earnings, Mr. Gordon now receives benefits which this year will total $36,480 -- no portion of which is subject to taxation of any kind.

Mr. Gordon draws his current income from three sources. From the Social Security Administration, Mr. Gordon and his family receive a total monthly benefit of $1,040. $440 monthly is received from an employer-funded pension. Current monthly Longshore Act benefits total $1,560. Both Social Security and Longshore Act benefits are increased annually.

If Mr. Gordon had resumed work following his injury and retired at age 65, he would have earned approximately $80,000 during those few years of work. Assuming that he lives his full life expectancy, Mr. Gordon is virtually assured of over $500,000 in Longshore Act benefits. The difference between the projected earnings and the projected Longshore Act benefits -- approximately $430,000* -- represents the "retirement bonus" now payable to Mr. Gordon in addition to the amounts received from Social Security and the employer-funded pension.

Mr. Gordon's decision to retire following his compensable injury doubled his annual take-home pay. That decision assured Mr. Gordon and his family of continued protection against future inflation and provided Mrs. Gordon with a fully prepaid lifetime annuity equaling the total annual earnings of the average working man or woman.

No compensation system can provide so significant an incentive for continued time loss and survive. Had S. 1182 been law at the time of Mr. Gordon's injury, his total "retirement" income would have been reduced to approximately $18,000, roughly $4,000 of which would have been payable by the self-insured employer. That result would have assured that Mr. Gordon's take-home benefits approximated his former take-home pay and could well have caused a postponement of the retirement decision and continued productive employment.

---

*The $430,000 figure vastly understates the dollar amounts which will become payable as a result of Mr. Gordon's injury. Mr. Gordon has a "second family" with a relatively young wife and two unemancipated children. The amounts probably owing Mrs. Gordon for "unrelated death" benefits dwarf Mr. Gordon's individual future entitlement.

S. 1182 eliminates pyramiding of retirement and workers' compensation benefits, restores needed return-to-work incentives, removes the nearly irresistible human temptation to exaggerate and limits the role of the Longshore Act to its wage-replacement objective.

CONCLUSION

S. 1182 is needed to restore balance to a major compensation program and assure that the goals of the 1972 amendment process are met. It merits enactment.

August 7, 1981

Dennis Lindsay, Esq.
Lindsay, Hart, Neil & Weigler
Suite 700
Columbia Square
111S.W. Columbia
Portland, Oregon 97201

Dear Mr. Lindsay:

In June 1981, you appeared before the Senate Labor Subcommittee and presented testimony in the Longshoreman's and Harbor Worker's Compensation Hearings. Enclosed with this letter you will find a set of questions based on issues raised by your testimony. Please answer these questions as thoroughly as possible and provide supporting materials as appropriate. If any aspect of a question is not addressed in your answer, explain clearly the reason for this omission.

Your prompt response is appreciated, and in any event, your answers should be mailed no later than two weeks from the date of your receipt of this letter.

Sincerely,

Harrison A. Williams, Jr.

HAW/ll
Encl.

FOLLOW-UP QUESTIONS TO: DENNIS LINDSAY (REPRESENTING THE MASTER
CONTRACTING STEVEDORE ASSOCIATION OF THE
PACIFIC COAST, INC.)

1. State the percentage of longshoremen working on the West Coast that are sent to employer-selected physicians, clinics or other treatment facilities at the time of injury.

2. State the percentage of longshoremen working on the West Coast who request authorization to utilize a physician of their own choosing at the time of injury.

3. State whether West Coast employers, as a matter of routine, select physicians for injured workers at the time of injury.

4. In your opinion, would introduction of a competitive pricing system for workers' compensation insurance would improve insurance availability for for employers on the West Coast?

5. In the course of your testimony before the Labor Subcommittee, you expressed support for the various offsets proposed in S. 1182. Explain the reasons for your position.

6. How do you reconcile your advocacy of S. 1182 with the current crisis that exists in the Social Security system?

7. How do you reconcile your advocacy of S. 1182 with the position taken by insurance company witnesses at the Hearing endorsing the concept of internalization of costs?

8. How do you reconcile your advocacy of S. 1182 with the fact that under its terms, many older workers could conceivably be denied all compensation benefits if injured on the job ?

9. How do you reconcile your advocacy of S. 1182 with the fact that workers are are being given incentives to remain in the active labor market longer than in past years?

10. Is your support of the Social Security offset proposed in S. 1182 in conflict with President Reagan's goal of maintaining the integrity of the Social Security system? Explain the reasons for your answer.

11. In your view,has the trend toward self-insurance reduced the cost of workers compensation coverage? What explanation can you offer for the result that you perceive?

12. List those longshoring jurisdictions which have premium rates set by the National Council on Compensation Insurance and/or state rating bureaus.

13. During the course of your testimony, you asserted the existence of the availability of cumulative state and Longshoremen's Act benefits without credit. State the reasons to support this assertion. Cite existing case law to support your position.

14. With reference to the issue benefits without credit, explain your understanding of the recent Supreme Court case of Thomas v. Washington Gas Light Company.

15. State whether American ports have been able to attract cargo ultimately bound for Canada. Explain the reasons for developments in this area as you understand them.

16. Does the Canadian Port of Vancouver receive subsidies from the Canadian federal and/or provincial governments? Be specific as to the source of funding.

17. During the course of your testimony, you asserted that cargo is being diverted from American to Canadian ports? State the reasons which support this assertion.

18. What are your views on the fact that productivity on the docks has increased at the same time that the cast of moving cargo has been reduced substantially over the past twenty years? How do you account for this phenomenon?

LINDSAY, HART, NEIL & WEIGLER
LAWYERS
SUITE 700
COLUMBIA SQUARE
111 S.W. COLUMBIA
PORTLAND, OREGON 97201
TELEPHONE (503) 226-1191
TELECOPIER (503) 226-0079

Dennis Lindsay
Allan Hart
Carl R. Neil
Jerard S. Weigler
Robert C. Shoemaker
Richard Wm. Davis
Jonathan A. Ater
James H. Bean
Carol A. Hewitt
Robert E. Babcock
W. W. Kirtley
Daniel H. Skerritt
Glen McClendon
Valerie D. Fisher
Robert W. Palmer
Larry G. Hittle
Thomas E. McDermott
James N. Gardner
Steven K. Blackhurst
Mark S. Dodson

Michael E. Haglund
Linda Triplett
Rex E. H. Armstrong
Douglas D. Smith
Frank V. Langfitt, III
William C. Campbell
Ronald L. Saxton
Grant E. Tanner
William M. Tomlinson
Rick Haselton
LaVonne Reimer
Thomas K. O'Shaughnessy
David T. Douthwaite

of Counsel
R. W. Nahstoll
Robert B. Conklin

September 4, 1981

The Hon. Harrison A. Williams, Jr.
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Re: Longshoremen's and Harbor Workers' Compensation Act
S. 1182: Follow-Up Questions to Master Contracting Stevedore Association of the Pacific Coast, Inc.

Dear Senator Williams:

Our responses to fourteen of the eighteen questions forwarded with your letter of August 7, 1981 follow. We are seeking the additional information necessary to provide adequate answers to Questions 7, 15, 16 and 17. Our comments on the issues raised by those questions will be forwarded as soon as the necessary information has been received.

Question 1: "State the percentage of longshoremen working on the West Coast that are sent to employer-selected physicians, clinics or other treatment facilities at the time of injury."

Question 2: "State the percentage of longshoremen working on the West Coast who request authorization to utilize a physician of their own choosing at the time of injury."

Question 3: "State whether West Coast employers, as a matter of routine, select physicians for injured workers at the time of injury."

Except in those infrequent instances involving individuals physically unable to make an informed choice, virtually all longshoremen injured while employed by Association members begin treatment with a physician of their own or their attorneys' selection. No Association members routinely select physicians for injured longshoremen. Very few longshoremen seek the employer's authorization before beginning treatment with the chosen physician. The employer frequently learns the identity of the chosen physician only when the medical bills and/or initial reports are received.

Question 4: "In your opinion, would introduction of a competitive pricing system for workers' compensation insurance improve insurance availability for employers on the West Coast?"

We do not believe that introduction of a competitive pricing system would increase the availability of LHWCA insurance for Association members. Instead, we suspect that such a system would lessen the number of insurers who might be drawn into the market if S. 1182 is enacted.

The 1972 amendments caused most former LHWCA insurers to withdraw from the market. As a result, Association members have not been able to obtain primary LHWCA coverage for several years. The various forms of insurance now utilized by Association members are currently priced through a "competitive system" outside the reach of traditional workers' compensation insurance cost regulation.

The theory underlying proposals for a "competitive pricing system" for workers' compensation insurance presumes that (a) a regulated pricing structure maintains premiums and insurers' profits at levels above those which would exist in a competitive environment, and (b) a competitive system would lower profit and inflated expense margins and, therefore, premium levels.

Competition can have that beneficial effect on rates only when a significant number of competitors occupy the market. Few companies now write primary LHWCA insurance. One of the major purposes of S. 1182 is to draw a number of competing carriers back into the LHWCA market. The necessary attraction can exist only if those carriers perceive significant opportunities for profit. Introduction of a new premium pricing mechanism which will lessen that potential profit will blunt the beneficial effects of the proposed amendments.

Many of the current problems involving the LHWCA arose from the way the insurance industry responded to the uncertainties caused by the 1972 amendments. The possible effects of a "competitive pricing system" are largely unknown. Introduction of a new pricing mechanism might well inject new areas of uncertainty sufficient to overcome whatever benefit the proposed amendments might themselves have otherwise provided.

Question 5: "In the course of your testimony before the Labor Subcommittee, you expressed support for the various offsets proposed in S. 1182. Explain the reasons for your position."

Question 6: "How do you reconcile your advocacy of S. 1182 with the current crisis that exists in the Social Security System?"

Question 8: "How do you reconcile your advocacy of S. 1182 with the fact that under its terms, many older workers could conceivably be denied all compensation benefits if injured on the job?"

Question 9: "How do you reconcile your advocacy of S. 1182 with the fact that workers are being given incentives to remain in the active labor market longer than in past years?"

Question 10: "Is your support of the Social Security offset proposed in S. 1182 in conflict with President Reagan's goal of maintaining the integrity of the Social Security system? Explain the reasons for your answer."

S. 1182 is fully compatible with current attempts to improve the financial stability of the Social Security system. Under current law, workers approaching normal retirement age face very substantial incentives for early "disability" retirement. An injured worker who declines return to productive employment is now eligible to receive collectively bargained-for pension benefits, Social Security benefits, and generous workers' compensation payments. Current Social Security "offset" provisions are not applicable to individuals over 62 years of age. If the current financial incentives to retirement cause individuals to withdraw prematurely from the labor market,* the financial burdens of that result obviously fall upon both the workers' compensation and Social Security systems.

The various offsets proposed in S. 1182 would remove incentives to early retirement, lessen the number of claimants to both workers' compensation and Social Security benefits, and therefore assist current efforts to improve the financial integrity of the Social Security system.

Question 8 does disclose an unintended effect of S. 1182. Although the various "offset" proposals would not cause any worker to go without benefit, that result could follow from the bill's provisions terminating payment of temporary total and unscheduled permanent partial disability benefits at the "prevailing retirement age". Theoretically, a worker disabled as a result of an injury occurring after the worker attained the "prevailing retirement age" would be foreclosed from appropriate benefit entitlement.

All workers, regardless of age, should be entitled to full benefits throughout periods of actual wage loss. That conclusion comports with fundamental fairness and practical sense -- the absence of any unscheduled partial benefit entitlement would almost certainly increase the frequency of claims to total disability. Workers who remain in the active work force past normal retirement age should retain appropriate partial disability compensation rights. Individuals who remain employed after reaching the prevailing retirement age should not be subject to an automatic benefit cutoff.

---

* The existence and magnitude of the incentive was documented in the Gordon proceeding discussed at Pages 16-18 of the Association's written statement of June 17, 1981.

One possible route toward this goal involves adoption of a statutory "retirement age" presumption stating substantially the following:

> "In the absence of substantial evidence to the contrary, it shall be presumed that the injured employee would have retired at the age prevailing in the industry and geographical region within which the employee was employed at the time of the injury. . . ."

Proof of actual work activities past the "prevailing retirement age" would certainly be "substantial evidence" contrary to the presumption sufficient to assure proper benefit delivery.

The effectiveness of this approach would be increased by slight modification of the current retirement cutoff language to a version similar to the following:

> ". . . shall be paid to the employee during the continuance of the disability, except that such compensation shall not be paid [after the employee attains the retirement age prevailing in the industry and geographical region within which the employee was employed at the time of the injury] after the date the employee would have retired from the industry within which the employee was employed at the time of the injury. . . ."

(Proposed addition underscored; proposed deletion bracketed.)

A proper tailoring of the "retirement age limitation" will erase the anomaly recognized by Question 8 and maintain needed incentives for continuing employment. S. 1182 is wholly consistent with President Reagan's efforts at maintaining the integrity of the Social Security system and the goal of encouraging workers to continued productive employment.

Question 11: "In your view, has the trend toward self-insurance reduced the cost of workers compensation coverage? What explanation can you offer for the result that you perceive?"

There is little doubt that the trend to self-insurance should cause a reduction of the cost of providing full workers' compensation coverage. The dollar amount of those presumed savings is very difficult to calculate. Theoretically, the savings should at least equal that portion of the insurance premium allocable to the underwriter's former profit. However, a portion of that limited savings is eroded by the need to obtain multiple levels of excess insurance and post the necessary bonds required of an approved self-insuring entity.

The major financial impact of self-insurance is probably that of postponing (as opposed to reducing) expenses. A self-insured employer failing to maintain truly adequate reserves on pending claims will fund the costs attributable to today's injuries from tomorrow's income. It is only when those postponed expenses are paid that the benefits and/or expenses of the decision to become self-insured can be accurately determined.

Question 12: "List those longshoring jurisdictions which have premium rates set by the National Council on Compensation Insurance and/or state rating bureaus."

Association members perform stevedoring and terminal services in California, Oregon and Washington. Until 1981, only Oregon utilized the manual rates established by the National Council on Compensation Insurance. The 1981 Oregon Legislature broke from past tradition and, effective in November, authorized a "competitive pricing structure". Neither Washington nor California regulate LHWCA premium levels.

It should be emphasized that Association members do not purchase insurance in accordance with "manual rates". The exorbitant premium levels following the 1972 amendments caused most Association members to turn to one of the various approved forms of "self-insurance" which are not subject to NCCI or State bureau regulation.

Question 13: "During the course of your testimony, you asserted the existence of the availability of cumulative state and Longshoremen's Act benefits without credit. State the reasons to support this assertion. Cite existing case law to support your position."

Question 14: "With reference to the issue of benefits without credit, explain your understanding of the recent Supreme Court case of Thomas v. Washington Gas Light Company."

In United Brands Co. v. Melson, 594 F.2d 1068 (5th Cir. 1979), the Court was faced with a claim for disability caused by a heart attack. The claimant moonlighted. He had an infarction. He sought benefits from his night-shift employer under the Louisiana compensation act. He also sought LHWCA benefits from United Brands. He succeeded on both fronts. The appellate proceeding squarely addressed the employer's claim to a credit for the amounts received in accordance with the state compensation system.

> ". . . The last issue in this case is whether Melson's federal award should be reduced by the amount of his state settlement? The Administrative Law Judge originally awarded United Brands a set-off for the settlement amount but the Benefits Review Board provided Melson a full recovery. United Brands argues that the Board impermissibly allowed Melson a double recovery.
>
> * * *
>
> ". . . We agree with the Board that no section of the Act requires that Melson's federal award be reduced by his state settlement.
>
> * * *
>
> ". . . Our own research has led us to a number of cases in which the federal court

> required that an amount made under the Act be reduced by the amount of a state compensation award. Calbeck v. Travelers Ins. Co., 370 U.S. 114, 82 S.Ct. 1196, 1206, 8 L.Ed.2d 368 (1962); [additional citations omitted.]
>
> "We believe that these cases are not controlling in the instant case. In each of these cases, one employer provided both the state and federal compensation. Therefore, the courts reduced an employee's federal award by the amount paid to him by his employer's state compensation coverage. By this method the employee did not receive a double recovery and the employer was responsible to pay only one full recovery.
>
> "In the present case, we are satisfied that Melson had received a double recovery in the sense that he was fully compensated by the state compensation system and federal system for a single condition. But, on the other hand, United Brands has not been prejudiced by Melson's recovery from the state system. Under the Act, United Brands is fully liable for Melson's injury. Melson's recovery from McKnight is a mere fortuity. To allow United Brands a set-off is to give United Brands a windfall in the amount of Melson's state award. Until Congress is moved by this unusual situation, we think the solution to this difficult problem is to allow the windfall of double recovery to reside with the injured worker rather than allow the set-off windfall to accrue to United Brands."
>
> (594 F.2d 174-75; emphasis added)

The Thomas decision reached the conclusion that the state and federal compensation systems were supplementary and contained the following language at Footnote 8:

> ". . . Of course, there is no danger of double recovery under concurrent jurisdiction since employers' awards under one compensation scheme would be credited against any recovery under the second scheme. See, e.g., Calbeck v. Travelers Ins. Co., supra, 370 U.S. at 171."

As noted earlier, the Fifth Circuit considered the Calbeck decision in reaching the conclusion in Melson and found that decision inapplicable to a situation involving multiple employers and a single physical condition. Thomas does not specifically address the problem in the multiple employer context. Legislative action remains necessary.

Question 18: "What are your views on the fact that productivity on the docks has increased at the same time that the cost of moving cargo has been reduced substantially over the past twenty years? How do you account for this phenomenon?"

Statistics maintained by the Pacific Maritime Association disclose the following "productivity" changes between 1960 and 1980:

(a) The cost per hour of loading or unloading cargo increased from $4.13 to $19.77;

(b) The number of tons loaded or unloaded per hour increased from .837 to 5.498; and

(c) The cost per ton of loading or unloading decreased from $4.94 to $3.60.

Over the last twenty years, therefore, productivity increases of approximately 650% have been accompanied by "per-hour" cost increases of approximately 475% and "per-ton" cost decreases of approximately 27%.

The productivity increases and "per-ton" cost decreases are almost entirely attributable to the massive capital infusion and mechanization which has occurred on the West Coast in the preceding twenty years. Rapidly increasing labor expenses and escalating insurance costs are a major reason why productivity improvements find so little reflection in "per-ton" cost decreases.

The omitted responses will be provided as soon as possible. Please let us know if any further information or clarification would be helpful.

Yours very truly,

Dennis Lindsay

Dennis Lindsay

DL:a

N.J.
SEP 19 AM 9:16

LINDSAY, HART, NEIL & WEIGLER
LAWYERS
SUITE 700
COLUMBIA SQUARE
111 S.W. COLUMBIA
PORTLAND, OREGON 97201
TELEPHONE (503) 223-1101
TELECOPIER (503) 226-0079

DENNIS LINDSAY
ALLAN HART
CARL R. NEIL
JERARD S. WEIGLER
ROBERT C. SHOEMAKER
RICHARD WM. DAVIS
JONATHAN A. ATER
JAMES H. BEAN
CAROL A. HEWITT
ROBERT E. BABCOCK
W. W. KIRTLEY
DANIEL H. SKERRITT
GLEN MCCLENDON
VALERIE D. FISHER
ROBERT W. PALMER
LARRY G. HITTLE
THOMAS E. MCDERMOTT
JAMES N. GARDNER
STEVEN K. BLACKHURST
MARK S. DODSON

MICHAEL E. HAGLUND
LINDA TRIPLETT
REX E. H. ARMSTRONG
DOUGLAS D. SMITH
KRISTENA A. LAMAR
FRANK V. LANGFITT, III
WILLIAM C. CAMPBELL
RONALD L. SAXTON
GRANT E. TANNER
WILLIAM M. TOMLINSON
RICK HASELTON
LAVONNE REIMER
THOMAS K. O'SHAUGHNESSY

OF COUNSEL
R. W. NAHSTOLL
ROBERT B. CONKLIN

September 16, 1981

The Hon. Harrison A. Williams, Jr.
Committee on Senate and Human Resources
United States Senate
Washington, D. C. 20510

Re: Longshoremen's and Harbor Workers' Compensation Act
S. 1182: Follow-Up Questions to Master Contracting Stevedore Association of the Pacific Coast, Inc.

Dear Senator Williams:

Reference is made to your letter of August 7, 1981 in which you posed questions for us to answer as counsel for the Master Contracting Stevedore Association of the Pacific Coast, Inc.

By letter dated September 4, 1981, we responded to most of the questions and stated that we would endeavor to secure information in order to answer those to which we were not in a position to respond.

In your question No. 16, you asked the following question:

> "Does the Canadian Port of Vancouver receive subsidies from the Canadian federal and/or provincial governments? Be specific as to the source of funding."

We retained Canadian counsel in order to directly contact the Port of Vancouver and, subsequently, on the basis of information sent to us, we have spoken directly with the Chief Financial Officer for the Port of Vancouver.

As background, you should understand that:

All of the property and facilities of the Port of Vancouver are owned by the Federal Government of Canada and are administered by the National Harbours Board.

This Board consists of four members appointed by the Governor-in-Council who are accountable to the Canadian Parliament through the Minister of Transport. Each port - there are 15 of them - has a General Manager who is responsible for managing the National Harbours Board activities within the Port. Twelve of the Ports, including the Port of Vancouver, have a Port Authority appointed by the Minister of Transport which acts as an advisory body to the Minister.

The National Harbours Board makes grants in lieu of municipal taxes based on estimated municipal assessments which are then adjusted in accordance with the Canadian Municipal Grants Act.

We are enclosing financial data for the Port of Vancouver as of December 31, 1980 which was included in the Annual Report of the National Harbours Board for 1980. This data shows that operating revenues considerably exceeded expenses for both 1980 and 1979. There was a net income of approximately $10.2 million in 1980 and $2.8 million in 1979.

The balance sheet as of December 31, 1980 shows assets of approximately $151,000,000 with long term debt of approximately $109,000,000 and contributed capital of $7.7 million, both of the latter contributed by the Federal Government.

From our review of the information furnished to us, it appears to us that the Port of Vancouver is not being subsidized by the Canadian Federal Government, infofar as its actual year-by-year operations are concerned. (The Port of Vancouver is one of the few ports operated by the National Harbours Board which operates at a "profit," most of the others operate at a deficit).

On the other hand, such subsidization is present in that the Port of Vancouver has (1) contributed capital of approximately $7.7 million received from the

Federal Government, (2) has long-term loans from the Federal Government of approximately $109,000,000, most of which are non-interest bearing loans with an indefinite due date, and (3) the National Harbours Board from time to time acquires other lands and facilities and transfers them to the Port of Vancouver. If all of the capital loans made available to the Port of Vancouver by the Federal Government were comparable to commercial long-term bonds with fixed interest and due dates, the amount of moneys required to amortize such loans might well cause the Port to operate on a net loss rather than on a net gain basis. To this extent, it might then be said that the Port of Vancouver was being subsidized by the Federal Government. Obviously, it would require an in-depth financial study to reach such a verifiable conclusion which we are not in a position to conduct.

Yours very truly,

Dennis Lindsay

DL:cp
Enc.

PORT DE VANCOUVER

Bilan
au 31 décembre 1980
($000)

	1980	1979
ACTIF		
À court terme	$ 54,768	$ 39,927
À long terme	5,848	6,132
Immobilisations	90,486	88,807
	$151,102	$134,866
PASSIF ET AVOIR DU CANADA		
À court terme	$ 11,227	$ 10,525
À long terme	109,504	104,253
Capital d'apport	7,733	7,733
Surplus	22,638	12,355
	$151,102	$134,866

État de l'exploitation et surplus
pour l'exercice terminé le 31 décembre 1980
($000)

	1980	1979
Revenus	$ 65,281	$ 51,314
Dépenses	55,452	46,570
Bénéfice de l'exploitation	9,829	4,744
Autres revenus (dépenses)	454	(1,939)
Bénéfice net	10,283	2,805
Surplus au début de l'exercice	12,355	9,550
Surplus à la fin de l'exercice	$ 22,638	$ 12,355

PORT OF VANCOUVER

Balance Sheet

as at December 31, 1980
($000)

	1980	1979
ASSETS		
Current	$ 54,768	$ 39,927
Long-term	5,848	6,132
Fixed assets	90,486	88,807
	$151,102	$134,866
LIABILITIES & EQUITY OF CANADA		
Current	$ 11,227	$ 10,525
Long-term	109,504	104,253
Contributed capital	7,733	7,733
Surplus	22,638	12,355
	$151,102	$134,866

Statement of Operations and Surplus

for the year ended December 31, 1980
($000)

	1980	1979
Revenue	$ 65,281	$ 51,314
Expenses	55,452	46,570
Operating income	9,829	4,744
Other income (expense)	454	(1,939)
Net income	10,283	2,805
Surplus - beginning of the year	12,355	9,550
Surplus - end of the year	$ 22,638	$ 12,355

Senator NICKLES. Mr. Lindsay, I appreciate your comments, and also Mr. Wilcox' comments concerning the number of times, you, Mr. Sullivan and others have trotted to Congress and told the story, and then went back home, and nothing was done.

I might tell you that I am not holding these hearings so nothing will be done. I might tell you, also, that these are not oversight hearings; these are legislative hearings.

We welcome Senator Williams with us this morning. I realize that he has a very strong interest in this legislation, being from the State of New Jersey, and some of the problems that are there.

Although this legislation is probably not the most interesting subject by some decrees, and is not quite as exciting as some people would like, it is very evident that something needs to be done, and this is our intention through the legislation. We appreciate the efforts of yourselves who have been, I guess, fighting the battle, and for other persons on the other side, for coming to the Congress and hopefully we can make some changes.

A couple of questions. Mr. Wilcox, you mentioned—and I have not seen a chart, and maybe it is in the legislation—but you mentioned the total cost, and you mentioned a figure of $33 million in 1972, and then you mentioned a cost in 1980 of $215 million.

Mr. WILCOX. That is correct.

Senator NICKLES. Costs have actually increased. Is this total amount of premiums, or total amount of claims, or what?

Mr. WILCOX. These are the costs that the Labor Department compiles from the files which it has as the actual payout of medical benefits and compensation benefits annually. These are the annual dollar payouts, no insurance premiums. These are the moneys paid to the injured or the allegedly injured worker.

Senator NICKLES. We are talking about increasing from $33 million to $215 million, an increase of sevenfold in a period of 8½ years?

Mr. WILCOX. That is correct.

Senator NICKLES. Do you have a copy of that? I would like to have that entered into the record, if we can, and if not, we need to get a copy of those payouts. I am not sure that I have seen that chart.

Mr. WILCOX. The figures I have are from the Department of Labor, in their annual report. I do not have the reports here. We can get them, or have the Department send them to you.

Senator NICKLES. Fine.

Mr. Lindsay, you mentioned something, too, and I very much appreciate this, because you mentioned a possible shortfall in the legislation as proposed, that we did not cover for overlapping between State workers' compensation and the Longshoremen's Act. Was that your statement?

Mr. LINDSAY. Yes. That is the point, as a result of the *Sun Shipping* case by the U.S. Supreme Court and the followup case involving the District of Columbia, it was made clear that you can go, if you choose to, by some nice feature of the State act, go there, and having done that, then you can come over to the Federal system and see what you can do there.

Senator NICKLES. Let me make sure I understand that. Let us say an individual lost the use of his arm; he sprained or broke his arm. Under our law, S. 1182, he would not be in the act, but let us say he was loading the railcar beyond the point of rest and was injured. Could he receive State, and then come back and file under longshore and receive payment on benefits?

Mr. LINDSAY. Yes, whatever benefits he would be entitled to under the Longshore Act. That is how they read the cases. And other attorneys we deal with read them the same way.

Senator NICKLES. I was thinking in our legislation that we did put in coordination of benefits.

Mr. LINDSAY. You did with respect to the social security system, with respect to the pensions, with respect to unemployment, but you did not have any offsets with respect to amounts paid under another compensation system.

Senator NICKLES. I appreciate you throwing that out, because that is obviously not the intent. I certainly think everybody in Congress would agree that it is not our intention that someone should basically receive benefits from two compensation plans.

Mr. LINDSAY. It is important that you show your intent, because the U.S. Supreme Court searches for your intent, and finding it not, decides what your intent was.

Senator NICKLES. Well, I think our intent will be very clear on that issue.

One other thing. You addressed the strike that was, I guess, called yesterday by the ILWU, and you mentioned that from what you heard they went on TV, and that the strike was caused because we are having proposed legislation?

Mr. LINDSAY. Yes; I had previously sent, or there was sent to your counsel, the fliers put out by the local for the ILWU down in the Los Angeles area, in which they called for a complete work strike. They told me from the coast yesterday what had happened was they had gone out all day Monday; it was a complete, no-work day. At the same time, they staged demonstrations with respect to these hearings and this particular bill, which the media picked up.

Senator NICKLES. I am very interested in the strike and I will discuss that later with representatives of that union. I guess I am really kind of concerned when we have one group that says that Congress cannot be considering legislation. That kind of bothers me in a society where we espouse—we will get that, and then I will see how angry I am about it.

Is the strike going today?

Mr. LINDSAY. No, sir. They told me it was 8 a.m. Monday until 8 a.m. Tuesday. We are here today on Wednesday.

Senator NICKLES. Were they calling the strike all up and down the west coast?

Mr. LINDSAY. No. It was confined to the Los Angeles area, the Long Beach-Wilmington area of Los Angeles.

Senator NICKLES. Was the intent of the union to go for the entire west coast, but only a select group?

Mr. LINDSAY. I cannot speak to that, but I know that the ILWU people are here, and they can obviously respond to your questions in that regard.

Senator NICKLES. Gentlemen, I have some other questions, but I also realize the time constraint.

I might ask Mr. Wilcox one additional question, because it was brought up yesterday by Judge Smith. Mr. Wilcox, do you have any suggestions concerning compensation on occupational diseases? Do you think that should be addressed in this legislation?

Mr. WILCOX. I think that is one of the most complex areas. It also looks like it is a disaster area, looking for a place to happen in the Longshore Act. I think the act now does provide for occupational diseases, but like many other provisions in the act, it is not specific. You have a provision written in 1927, and now we have new ground rules in 1981. And I think the act should specifically address itself to the entitlement question, when is an occupational disease incurred.

There was a case that Judge Smith referred to yesterday which was just decided last Friday, in which the Benefits Review Board, in a 2-to-1 decision, said that for the purposes of at least computing average weekly wage, the date of injury is the date of last exposure to the injurious stimuli—which will drive lawyers up the wall, trying to figure out what that means. The question that then follows that, about notice period, statute of limitations, the act does not address it all in one place as to the entitlement. The benefits are there, if you can prove that you are entitled to get them. The difficulty now is that neither the claimant or the employer nor the carrier really is sure about when an occupational disease sets in or frankly, what is an occupational disease.

Senator NICKLES. Fine.

Senator Williams, do you have any questions?

Senator WILLIAMS. I regret very much that I could not be here at the beginning to hear the direct statements of the witnesses——

Mr. WILCOX. I think you heard it all last September, Senator. There are not too many changes.

Could I clarify for myself your feeling about two or three things, if I might, Mr. Chairman.

Senator NICKLES. Please.

Senator WILLIAMS. Before the 1972 amendments, the jurisdictional test of coverage dealt with was it a colloquialism or was it a real definition of jurisdiction—the water's edge, was that what it was?

Mr. LINDSAY. Absolutely, Senator.

Mr. WILCOX. Yes.

Senator WILLIAMS. And there were multitudes of problems, as I recall, that led everybody to feel there had to be some changes. Am I right or wrong in that?

Mr. LINDSAY. As far as we are concerned, you would be wrong, but the other side did raise the idea—it came up particularly with respect to the hold man, the fellow who works shoreside, onboard the ship, and then the person who was handling the slings, he would leave the slings and go onboard. And at that time, you were reacting to the concept that if a man was in effect rotating and was doing the same type of work as another gang, they should all come under the same compensation benefits, the same scheme—only somewhere between that concept and the language that finally resulted, there is a multitude of difference.

Senator WILLIAMS. Well, I remember those days and nights. I did not linger through the late nights and early mornings as some of you who did with our staff, but I would leave about 9:00 at night and come in in the morning, and there you were.

I thought the last appearance, Mr. Lindsay, on your face when this was all over was a smile, that what we had done had seemed to develop a rather broad consensus—maybe I am wrong on this; it was 9 years ago——

Mr. LINDSAY. With respect to the coverage, I think you are in error. I probably have so many wrinkles in my face that you misinterpreted what was not a smile.

[Laughter.]

Mr. LINDSAY. Actually, if your counsel were here, he would tell you that going down to the end on that thing, this was one point that our group out on the west coast could never agree to because we never knew where loading started and unloading ended; therefore, we saw all kinds of problems, and we never acceded to it. But as you will appreciate, the thrust of the 1972 amendments was with what we called the curse of the third party cases, and that is what the legislation really got at.

Senator WILLIAMS. How did that work out?

Mr. LINDSAY. As far as we are concerned, it has worked out well, sir.

Senator WILLIAMS. That seemed to be the issue that caused the greatest concern, the third party.

Mr. LINDSAY. Yes. The third party law suits were what really brought the 1972 act on. I think that is what caused you to move on it as chairman of the committee at that time.

Senator WILLIAMS. So we solved something. And now, evidently—I know there are other problems. I have a statement that I will make at the convenient time, Mr. Chairman, that indicates the concern I feel, too, with the problems that have surfaced, some of the uncapped benefits areas and others, and certainly, we must deal with that.

But on this whole jurisdictional point, I am just, I am just wondering whether, in the proposal before us, we are not heading back into the same confusion that we were in, as I understand it, pre-1972.

Gilmore and Black are authors who enjoy respect—am I right on that?

Mr. LINDSAY. You are.

Senator WILLIAMS. They said, "The relationship between the Longshore and Harbor Workers' Act and otherwise applicable State compensation laws was shrouded in impenetrable confusion," they were stating, "as the law was pre-1972."

And I am wondering whether we would not be heading back into more confusion. Couldn't a longshore worker step in and out of jurisdictions just by remaining very close, within one worksite, and yet be first state covered and then longshore covered, and doing broadly the same job?

Mr. WILCOX. In most ports on the Atlantic coast and the gulf, there is a clear distinction in the collective bargaining agreements and in the day-to-day practices as to who goes on the ship and who does not. I think the Supreme Court had a lot to do with creating the confusion by inventing doctrines such as "the twilight zone", which said, "When in doubt, put them in the twilight zone" before

1972. Now they have reinvented the "twilight zone" in the *Sun Shipping* case, where they say, "We still do not know where the jurisdictional line is, so we will say that Congress intended to superimpose the Federal on top of the State, rather than make the vertical delineation.

But a terminal worker in practically every port, the Great Lakes, the Atlantic coast and the gulf—Dennis will tell you more about the west coast—the man who works in the terminal 8 hours a day, 5 days a week, knows that that is his job. He is not going to go on the ship that day. The stevedore and the longshore gang, the people who actually work on the ship, be it a container ship, a lash ship or whatever, know that they are in that longshore gang that day, and they will be on and off the ship.

The definition in S. 1182 provides that those particular workers will always be covered by the Longshore Act on the day that they are assigned to that stevedoring gang. It also provides that the man who works in the terminal, who will never go on the ship on the day that he is employed, and is not going to walk in and out of coverage; will always be under State coverage. To us, it is clear, and I think to the ILA it is clear. In one of the organizing disputes they had in North Carolina when they were trying to organize the State employees of the North Carolina State Port Authority, one of the stipulations in the litigation was that the employees of the North Carolina State Port Authority were terminal workers, and they would not work on the ship. The longshore gang, who were employed by private employers in North Carolina, are the ones who went on the ship. It is a specifically known differentiation of work that is known by everybody.

Now, there is always a problem when you try to define something in a statute. What we are trying to do is somehow, get definitions in the statute—and maybe S. 1182 is not the perfect answer, but we have not heard of a better one—that will eliminate this constant jurisdictional haggling over who is and who is not covered. The latest Supreme Court decision said that you had to be involved in actual moving of cargo between the vessel and the inland conveyance. That is the Supreme Court. But we had decisions from the Labor Department that said a gearman, a repairman, a container repairman, somebody painting a forklift truck, is engaged in maritime employment. That is not what the Supreme Court said, but that is the type of jurisdictional arguments we are still having.

Senator **Williams**. You are not completely satisfied with the definition proposed here, in this bill?

Mr. **Wilcox**. I think it is the best one I have seen, Senator. To me, it is clear. Now, to other members of the bar, or those who would take opposition positions, maybe it is not clear. I think it is.

Senator **Williams**. Mr. Lindsay, what was your observation on the——

Mr. **Lindsay**. Well, as we said in the direct testimony, Senator, this has not really been a major issue with us. We have accepted the fact that under any definition, most of our work force would be involved under the Federal Act, and therefore, we have not really gotten into this particular arena.

There are many, many other interests, and many people want to testify that this is an issue that affects them very vitally, and I think they can speak to it with far more clarity than I can.

Senator **Williams**. In a situation such as this, how would it be covered. A longshoreman unloading containerized cargo moved from the pier into a warehouse, and the warehouse is right there, harborside—would he be covered by the Act?

Mr. **Wilcox**. Moving containerized cargo from where to where?

Senator **Williams**. Unloading.

Mr. **Wilcox**. Unloading the ship?

Senator **Williams**. Unloading containerized cargo. In other words, there it is. There is the container, right there at harborside. He is unloading that container.

Mr. **Lindsay**. Do you mean the container itself, or the cargo within it, sir?

Senator **Williams**. The cargo within the container.

Think about it, while I ask about another matter that troubles me. Changing the defense based upon intoxication—has this been talked about before I came in at all?

Mr. **Lindsay**. It has not been, yesterday or today, sir.

Senator **Williams**. As the law is now, in order to be a defense to a claim, intoxication must be found to be the sole reason for the accident, right?

Mr. **Wilcox**. That is correct.

Senator **Williams**. The bill before us would remove that.

Mr. **Wilcox**. Yes, sir, we fully support it.

Senator **Williams**. I am just wondering whether this is out-of-phase with this kind of defense in other compensation acts; it goes back pretty much to where we were before compensation, no-fault compensation acts, for workers' injury claims. And I am just wondering whether you are not walking into—whether everybody isn't walking into a great deal of unnecessary litigation on that issue—in an area where, if there is a problem, we should be dealing with it in other ways.

Mr. **Wilcox**. But there is incredible litigation now over what is solely caused by intoxication. If a man is inebriated on the job and falls down without hitting anything other than the ground and dies, that injury is caused solely by intoxication. If he is intoxicated on the job and falls, and in the process of falling, he hits his head on something and is injured, that injury is not caused solely by intoxication, under the present interpretations.

In the interest of safety, an intoxicated worker is a danger to himself and fellow workers, and if there is no sanction or no prohibition for intoxication on the job, then you are not going to stop intoxication on the job.

Senator **Williams**. Am I wrong on this? Isn't there always a way to handle the worker who has the problem of intoxication on the job?

Mr. **Wilcox**. Not in our industry, sir.

Senator **Williams**. There isn't. What kind of programs do you have, by the way, to deal with that in the longshore and stevedoring industries?

Mr. **Wilcox**. I cannot answer that question, but I can try to get the answer from the National Maritime Safety Association.

Senator **Williams**. It just impresses me—I am not going to take anymore time—it just impresses me that this is a step all the way back and is not mindful of all that has been done to deal with this as a problem where there can be some affirmative response in reaching out to helping the guy, rather that cutting him off from compensation, using that as first punitive, and possibly a deterrent to coming on the job.

Mr. **Wilcox**. Well, I think we are both trying to get to the same objective, but unfortunately, we have to take our workers the way they are delivered to us from the hiring hall.

Senator **Williams**. You do not have the—well, that is all for now.

Thank you, Mr. Chairman.

Senator **Nickles**. Thank you, gentlemen. We appreciate your interest and your testimony.

Senator Williams, do you have a statement that you would like to put in at this time?

Senator **Williams**. Yes, while the next panel is arriving, why don't I do that.

Thank you very much, Mr. Chairman.

I would like to make these comments. The Longshore Act has been the subject of significant employer dissatisfaction in recent years, as well as charges of abuse of the claims process and mismanagement. These charges are of particular concern to me, coming as I do from a very significant port State.

I have had many meetings with representatives of stevedoring companies, have visited facilities at Port Newark and Port Elizabeth, and last fall, chaired oversight hearings on the Longshore Act.

I share the concern of many to improve the functioning of the Longshore Act. The act is intended to serve the purpose of providing full and adequate worker's compensation for employees in the industry. It must be recognized that, notwithstanding radical improvements in technology, work in the longshore industry continues to be highly hazardous. Every day that a longshoreman reports for work, he faces great risk.

Indeed, a full and fair review of the problems of the Longshore Act cannot, in my judgment, be made without a more fundamental review of the underlying problems of health and safety in this industry. I believe that a full appreciation for the problems of the longshore industry cannot be made without a personal visit to port facilities and a review of their operation.

While there have been many problems with the functioning and administration of the Act, many of the issues underlying these problems are incredibly complex and difficult to understand and interpret. Resolving these problems legislatively requires extraordinary care, lest the underlying purpose of fairly compensating injured workers be lost.

In my view, S. 1182, as presently structured, loses sight of the basic, underlying purpose of the Longshore Act. Under the guise of correcting abuses of the act, this bill would, in many respects, roll back the Longshore Act to the equally undesirable circumstances that existed prior to the 1972 amendments.

It is my hope that as we review this important legislation, we do not lose sight of the need to fairly compensate the legitimate claims of the thousands of injured workers who are the proper beneficiaries of the Longshore Act.

Thank you very much.

Senator NICKLES. Thank you, Senator Williams. I can tell you I very much concur with a great deal of what you said, particularly your last statement, that when we do look at the amendments that I think probably need to be made, that we do not want to jeopardize the benefits of those people who have a just claim. I am sure, and I am confident that many of those people are very honest, and many have very just claims. It is certainly not my intention to jeopardize those persons from those benefits.

I am really glad that you are here today. I wish that you had met our first witness, who was from the New Jersey/New York Port Authority. I think you would have been interested in his statement because of some of the points that he was making.

Also, you mentioned the possibility of visiting the ports to see first-hand; I think that is a point well-made. Our staff has; I have not. If you are inviting me, I would look forward to joining you in New Jersey at some time that we can get together to personally view some of the problems that we are working with today.

[Senator Williams prepared statement follows:]

PREPARED STATEMENT OF SENATOR WILLIAMS

Senator WILLIAMS. Today we are beginning 3 days of hearings on S. 1182, a bill to amend the Longshoremen's and Harbor Workers' Compensation Act.

The Longshore Act has been the subject of significant employer dissatisfaction in recent years, as well as charges of abuse of the claims process and mismanagement. These charges are of particular concern to me as they affect the operations of port facilities in New Jersey and the health functioning of the maritime industry in my State and elsewhere. It is for this reason that I have had many meetings with representatives of stevedoring companies, have visited facilities at port Newark and Port Elizabeth in New Jersey, and last fall chaired oversight hearings on the Longshore Act.

I share the concern of many to improve the functioning of the Longshore Act. The Longshore Act is intended to serve the purpose of providing full and adequate worker's compensation for employees in the longshore industry. It must be recognized that, notwithstanding radical improvements in technology, work in the longshore industry continues to be one of the most hazardous occupations in our country. Everyday that a longshoreman reports for work, it is at risk of life and limb. Indeed, a full and fair review of the problems of the Longshore Act cannot, in my judgment, be made without a more fundamental review of the underlying problems of health and safety in this industry. I believe that a full appreciation for the problems of the longshore industry cannot be made without a personal visit to port facilities and a review of their operation.

While there have been many problems with the functioning and administration of the Longshore Act, many of the issues underlying these problems are incredibly complex and difficult to understand and interpret. Resolving these problems legislatively requires extraordinary care lest the underlying purpose of fairly compensating injured workers be lost. In my view, S. 1182, as presently structured, loses sight of the basic underlying purpose of the Longshore Act. Under the guise of correcting abuses of the act, this bill would, in many respects, roll back the Longshore Act to the equally undesirable circumstances that existed prior to the 1972 amendments. It is my hope that as we review this important legislation, that we do not lose sight of the need to fairly compensate the legitimate claims of the thousands of injured workers who are the proper beneficiaries of the Longshore Act.

Further, in reviewing these amendments there is one provision I found particularly disturbing. Section 3(b) of the bill denies an injured worker compensation if intoxication contributed to or caused the injury in any manner. Present law specifies that compensation shall be denied only if an injury was occasioned solely by the claimant's alcoholism.

This change reintroduces the element of fault in what is supposed to be a no fault statute. In this way it is completely contrary to the whole philosophy of workers' compensation law.

Just as important, it is a step backwards from the development of effective treatment for job alcoholism. It would be one thing to require a worker whose injury was occasioned by intoxication to become involved in an alcohol abuse program as a condition to receipt of compensation. That might be a constructive approach. Instead, however, this bill chooses the punitive approach—a complete denial of compensation if intoxication is in any way a causal element of the injury. The proponents of the provision claim that this will deter intoxication on the job. Yet, time and time again this approach has not only failed, but failed miserably.

Many maritime employers have shown great sensitivity to the problem of workplace intoxication and alcoholism. Because of this, I am hopeful that upon reflection, the industry will not insist on reverting back to an archaic and counterproductive approach to this dilemma.

Senator **Nickles**. On our next panel we have Pat Sullivan from Buffalo New York, who is legislative director for the International Longshoremen's Association. With him is Joe Leonard who has been active in following this legislation for 24 years. Also, we have Michael Lewis, Washington representative of the ILWU, accompanied by Bruce Krieger, with welfare affairs of the ILWU, Wilmington, Calif. And the other gentleman?

Mr. **Lewis**. Mr. Chairman, our third witness is Mr. Bill Luch, from ILWU Local 8 in Portland, Oreg.

Senator **Nickles**. Welcome, all of you.

Please proceed, Pat.

STATEMENT OF PATRICK J. SULLIVAN, LEGISLATIVE DIRECTOR, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, WASHINGTON, D.C., ACCOMPANIED BY JOE LEONARD; MICHAEL LEWIS, WASHINGTON REPRESENTATIVE, ILWU, ACCOMPANIED BY BRUCE KRIEGER, WELFARE AFFAIRS, ILWU; AND BILL LUCH, ILWU LOCAL 8, PORTLAND, OREG.

Mr. **Sullivan**. Mr. Chairman, Senator Williams, my name is Patrick J. Sullivan. I am legislative director of the International Longshoremen's Association. I have been a member of the ILA for

38 years, and I have served my entire working career as a member of the ILA, working as a longshoreman in various crafts. For the past 30 years, I have been an elected official of locals, districts, district councils, chief executive officer of a district of the ILA, and I have, throughout the course of my career, developed some first-hand knowledge about the hazards and the concerns of the people that we represent.

Something that strikes me directly in these hearings is that I know that the people who go to the docks of our Nation on a daily basis look to their union and the people that they elect which by far are honest and responsible people who stand for elections under very stringent conditions, who are dedicated to improving the welfare of the people they represent, to provide a safe workplace under the best conditions.

In the testimony that I have heard for the past 2 days, I think the impression might be that fraud in the ILA is rampant; that the average longshoreman is not a hardworking person, is a person who might be inclined to shirk work and to utilize benefits provided under the law to enrich himself. This is not my impression. My impression of the average longshoreman is that he or she is a very patriotic, hardworking person who wants to earn a living and participate in the good things that our country provides for us.

I am appearing today on behalf of our international president, Thomas W. Gleason. He wished that he could be here today, but because of a conflict in the schedule of this hearing, he is participating, along with some 350 other delegates of the ILA, and the employers representing all of the employers on the east and gulf coasts, in a contract dispute matter which could lead to a reopening of the contract—nothing to do with these proceedings, of course. But he asked me to convey to the committee his wish that you would read carefully the prepared statement which we have submitted, and particularly attachments 4 and 5, which are an analysis of the workmen's compensation laws in two areas of our Nation. If you review this statement, the main issue, if not all of the issues that have been raised by previous persons who have testified are addressed in our statement. And I think if you review the tenor of the statement, it comes forth that we in the ILA are concerned and have a goal of preserving the benefits of the people we represent, in reducing costs by the very basic means of reducing the number of accidents.

I have again, as I say, first-hand knowledge of people whom I know who have worked—Now, people do not want to lose an arm or a leg or a life; it just does not make sense. There are malingerers. And in the contract that we have with the shipping associations, there is a provision where the union and the employers will meet in an attempt to reduce the cost of compensation and to improve productivity, and by doing it in a positive way and not a punitive way.

One area—and my colleague, Mr. Leonard, will speak to this—the one area that seems to lack emphasis in this legislation under consideration is the obvious solution of providing uniform, safe standards, well-enforced, by the unions and the employers, and with the help of the Federal Government.

We have heard testimony that perhaps we should go to the States and let the States determine what the benefits should be for a longshoreman who is injured. Well, I am of the opinion that the leg of a Texas longshoreman is worth the same as the leg or the life of a New Jersey longshoreman.

Realizing the constraints that we have on time, I would like to say, in concluding my remarks, that the ILA is anxious to work with the committee, offer input in any matters that the committee feels that we can be of help to you; that, if we have a common goal of protecting the workers and reducing accidents, that we will be carrying out our duties to these people that we represent, you as members of the Government and we as representatives of the union.

With that, I will ask my colleague, Joe Leonard, to address the matter that I have raised about the concerns about safety training programs. Mr. Leonard has been a longshoreman for 54 years, and for the past 25 years, he has served as safety director of the ILA. In the course of his duties, he has seen literally hundreds of people who have been maimed and seen the bodies of people who have been killed in this occupation. He has the reputation of being a one-issue person: Safety in the workplace and safety for the people that the ILA represents.

Mr. Chairman, Joe Leonard.

Mr. LEONARD. It gives me a great pleasure as a longshoreman to come here with all these distinguished lawyers. I will tell the story how it should be told.

I am here for the human being, and I am here to work with management. I have worked with them. But I would like to go back to a little history. I have heard a lot of stuff here about the old merry-go-round.

In 1927, when I was working on the waterfront, I got hurt. I never got a dime. They told me they would fire me if I asked for money for this hand. So they came to our people and said change the Jones law, that we will have no third party suits, and under the agreement, you will get a safety code.

This safety code is an antique. It is a safety code for stevedore operation, the U.S. Employees' Compensation Committee. Every one of these stevedores in every port put this safety code out, because that was the agreement, to do away with the third party. I will make a copy for you and see that you get a copy, Mr. Chairman.

Now they talk about the money. They were making millions of dollars during the war years. In 1927, we gave up our rights. We got $25. Up until 1947, that is all we got, $25 a week. When we were working in the war, we were making $200 and $300 a week; all a man could get was $25 a week, and they were making millions and billions of dollars during the war years. Then, in 1948, we went to $35 a week, up until 1955. Then, in 1956—and all these years, I have been in Washington—$54, up to 1960, when everybody else was making plenty of money. Then, in 1961, $70, and under the conditions in 1960, they had a free choice of doctor then. And then they asked for a panel of doctors. And then they said, "Next year, you come back to Congress, and we will give you free choice of doctor." We got the free choice, and Senator Williams at the time was chairman, in 1972.

Now they talk about free choice of doctor. I am willing to prove to your staff that 80 percent of the men do not know their rights, and they go to the company doctors. Let them produce the records, and we will see who is right or wrong; I am telling you that. The men were never educated, and I cannot do much. We go and tell the men what their rights are. Not only that. I represent labor/management on the disability board, where it is fair play because there are funds concerned there. And no man gets away with anything with me, because I represent both sides and on disputed cases. And I have been in and out of the conversation. I have men come to my office, tell me the conditions that exist. Last week, the company was paying a man $120. He came up to me and he told me his salary was $26,000 last year. I said, "You go back to the company, and we will call the compensation people about this case."

"Oh," they said, "we made a mistake. You get about $300 a week."

Now they are talking about the change. They went to the Supreme Court four times. They lost four times when they asked for jurisdiction. They talked about the widow's pension. The Supreme Court ruled against them. Now they give you the gimmick. When the law was passed, they were employing men on the dock. "We are not paying you. We are paying you State money." But do you know who was paying the rest? The New York ILA. We have a guaranteed annual wage, and the money was coming out of our funds to pay the man who was getting $60 or $80 or $90 a week. When the Supreme Court decision came down, they were fined 10 percent and 6 percent. They are still doing it today, and we insist that they be fined for that.

Mr. Wilcox does not negotiate with us, has never negotiated with us. He knows nothing about the ILA. He is just an outside lawyer. The men who represent the steamship people are meeting right now in Florida, and President Gleason is bringing up the issue of safety in there right now.

So to go back—you talked about the port authority in New York. This is a crane that came down. It was investigated by the Coast Guard, the Department of Labor, and a private concern; it was faulty steel. Millions of dollars were lost. The man lost his leg in this deal. What are they going to offer the man? A few pennies.

You talked about the specialists. Three different times, I went to the company about a specialist. Nothing was done about it. And they talked about occupational disease. Let us talk again. I was on the U.S. Department of Labor Advisory Committee in 1974 and 1975, with four from management, four from labor, and two public members, two Government members. Fifteen people—a fair committee. We wrote the law. They testified in New Orleans and Baltimore. I worked in New Orleans, 5,000 tons at a time on the specialists, and I did not think I was doing anything wrong, even though NIOSH told them it should back them up. Then men were in worse conditions than any men in the shipyard—the dirt and all the vegetables and all the chemicals were in the hold of the ship, with the carbon monoxide. We never heard of these things. And I defy any of these companies to show me how much money they paid out on occupational disease.

Senator **Nickles**. Let me interrupt here, because we are operating on a 5-minute limit.

Mr. **Leonard**. All right. I just have one more picture to show you. This is in Baltimore—two cranes in the river, every crane knocked out. Do you know why? Because there was no wind indicator. And the same thing, we had three this year, two in Jersey and one in Baltimore—in the river again. These machines go, and the last money they do not talk about—millions of dollars. More money is lost in direct cost than is paid in compensation. And I defy any of them to come up here and tell me I am a liar.

[The prepared statement of Mr. Gleason follows:]

PREPARED STATEMENT

OF

THOMAS W. GLEASON

International President
International Longshoremen's Association, AFL-CIO

BEFORE THE

SUBCOMMITTEE ON LABOR

OF THE

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

ON

PROPOSED AMENDMENTS TO THE
LONGSHOREMEN'S AND HARBOR WORKERS'
COMPENSATION ACT
S. 1182

June 16-17, 1981

Washington, DC

◆

Mr. Chairman and Members of the Subcommittee:

My name is Thomas W. Gleason. I am the International President of the International Longshoremen's Association, AFL-CIO also known as the "ILA".

The ILA represents in excess of 110,000 members working in ports from Maine to Texas on the North Atlantic, South Atlantic and Gulf Coasts of the United States as well as on the Great Lakes and in Canadian ports. More than 80,000 of our members are employed on waterfront docks, piers and terminals by stevedores and vessel carriers in a multitude of related crafts and occupations. Their interests are vitally affected by the present proceedings on amendments supported by their employers and, in turn, by their insurance carriers.

The members of this Subcommittee and any other persons who can look at these proposed amendments from a disinterested and objective perspective, can only conclude that they will undo much of what the 1972 Amendments accomplished. But more than that! The longshoremen's employers and their insurance carriers are now asking this Subcommittee and the Senate for whom it acts to relieve them of the foreseeable effects of a bargain that they made with open eyes back in 1972, while at the same time quietly retaining the very substantial advantages that they gained in that deal. I will now explain my contentions, in the firm belief that when all the cards are laid on the table, the members of this Subcommittee will realize that they are being hoodwinked by a lot of hollow, one-sided, self-interested arguments and transparent figures at the singular expense of the longshoremen and other beneficiaries of the Act. The Act was enacted with their protection and safety in mind and not that of their employers and the carriers.

In 1977, the Supreme Court in the Caputo case (Northeast Marine Terminal Co., Inc., et al v. Caputo, 432 U.S. 249) declared that the original Act in 1927

> ". . . was designed simply to be a gapfiller to fill the void created by the inability of the States to remedy injuries on navigable waters."

It called the 1972 Amendments:

> "the first significant effort to reform the 1927 Act and the judicial gloss that had attached to it."

The Court as well as the House and the Senate found that "more of the longshoremen's work is performed on land than heretofore", since modern technology, particularly containerization, had moved much of our members' work from the vessel onto the terminal. The Court noted:

> "unlike traditional break-bulk cargo handling, in which each item of cargo must be handled separately and stored individually in the hold of a ship as it waits in port, containerization permits the time consuming work of stowage and unstowage to be performed on land in the absence of the vessel. The use of containerized ships has reduced the costly time the vessel must be in port and the amount of manpower required to get the cargo on the vessel. In effect, the operation of loading and unloading has been moved shoreward; the container is a modern substitute for the hold of the vessel. . . . Congress's intent to adopt the [Act] to modern cargo handling techniques clearly indicates that these tasks, heretofore done on board ship, are included in the category of 'longshoring operations'."

Congress acknowledged that if coverage were not extended to cover the entire sphere of the longshoremen's daily work, "there would be many workers who would be relegated to what Congress deemed clearly inadequate State compensation systems." Congress wanted a system that did not depend on the "fortuitous circumstance of whether the injury [to the longshoreman] occurred on land or over water." S. Rep. at 13; H.R. Rep. at 11. In the overriding interest of uniformity and the new realities of the handling of maritime cargo, it therefore extended the situs under the Act to encompass the waterfront areas where the overall loading and unloading process occurs. I am certain that the members of this Subcommittee harbor no illusions that the Act in any way limited or was intended to limit coverage of employees working in the entire gamut of cargo handling operations in the ports.

With all of these considerations in mind, representatives of all of the various longshore and maritime interests met in 1972 to resolve their problems with the content and administration of a then far-outdated Act. Representatives not only of the Union and the Department of Labor, but also of the stevedores, vessel carriers, and the insurance carriers were present.

I can assure you, Mr. Chairman, that there was no discussion of limitations or "point of rest" that are now being contended for by the employers and carriers. To the contrary!

Because of the impact of containerization, because the handling of maritime cargo no longer was confined to the vessel, the slip, or a finger pier but then and now extends to huge container marshalling yards and terminal sheds where the cargo inside the containers was inserted and removed (known as "stuffing" and "stripping"), to the repair and maintenance of containers, to delivery and receipt of containers and break-bulk cargo from overland carriers at the terminal gates, and to other activities that at one time took place next to the vessel, the parties to those negotiations were fully aware that any attempt to define the dynamic, multi-faceted and constantly changing industry from within was bound to lead to confusion and obsolesence. By 1972, it was understood by all of the parties who were represented at the piers and terminals that the limits of "longshoring operations" fall within the limits of the vessel on one side and the overland carriers on the other. Between these two boundaries, all persons handling the cargo in one or another manner were engaged in longshoring operations, no matter what new or different tasks are required by the present state of the craft.

This view has been vindicated by the Supreme Court. The legislative history, as found by the Court, recognized that

> "the main concern of the Amendments was not with the scope of coverage but with accommodating the desires of three interested groups: (1) ship owners who were discontent with the decisions allowing many maritime workers to use the doctrine of "seaworthiness" to

> recover full damages from ship owners regardless of fault; (2) employers of the longshoremen who, under another judicially-created doctrine, could be required to indemnify ship owners and thereby lose the benefit of the intended exclusivity of the compensation remedy; and (3) workers who wanted to improve the benefit schedule deemed inadequate by all the parties. Congress sought to meet these desires by specifically eliminating suits against vessels brought for injuries to longshoremen under the doctrine of "seaworthiness", by outlawing indemnification actions and indemnity agreements, by allowing suits against vessels or other third parties only for negligence, and raising benefits "to a level commensurate with present day salaries and with the needs of injured workers whose sole support will be payments under the Act."

The present proposals would restrict the definition of the term to the loading and unloading of cargo between vessels and a so-called "point of rest." It will eliminate numerous categories of employees whose work is so interrelated with the employees who would continue to be covered, that it would leave a haphazard patchwork of coverage and non-coverage that will be as intolerable and unworkable as the Act was prior to the 1972 Amendments. It takes the guts out of the first bill in 50 years to update the history of the waterfront. It lacks all consistency and realism for those who actually work the docks and terminals day in and day out.

In the eight plus years since the Amendments came into effect, it is not surprising that the "point of rest" limitation has been rejected by all but one of the Circuit Courts that have considered it as well as by the Supreme Court and by virtually all of the legal and other commentators on the subject. As I just pointed out, stevedores and carriers did not pursue that point in 1972. The Supreme Court likewise found in Caputo, that the theory is:

> "simply too restrictive, failing to accommodate the language or the intent of the Amendments. . . . The theory does not comport with the Act's focus and occupations and its desire for uniformity".

It perpetuates the growing evils of the old Act, which bifurcated coverage for essentially the same employment. As another Court stated:

> "the point of rest approach would seem to result in the same sort of bifurcation, since the same employee engaged in an activity beyond the point of rest would cease to be covered. . . . In addition, the theory fails to accommodate the intent to cover those longshoring operations that modern technology has moved onto the land. Coverage that stops at the point of rest excludes those engaged in loading and unloading the modern functional equivalents of the hold of the ship."

Mr. Chairman, you and the members of the Subcommittee, like the Justices of the Supreme Court, do not have to strain your imaginations to realize that the "point" of initial placement of cargo varies from port to port and with different types of cargo; and that the point can be moved seaward or landward at the whim of the employer. Such characteristics make it inconsistent and irreconcilable with the uniform system Congress sought to design.

In this regard, I believe that the members of the Subcommittee can join me in rejecting the ludicrous statement by one of the employer representatives who has stated that persons who are employed at a container terminal in the Port of New York in various phases of container cargo handling are merely "freight handlers". This very feeble attempt to distinguish between these unidentified employees and all other employees employed at his terminal absolutely confounds us in view of the consistent and persistent position taken by the New York Shipping Association and the Council of North Atlantic Shipping Association, of which this representative's principals are members. It flies in the face of their arguments to the Supreme Court as well as to many appellate courts over a continuing series of litigation involving longshore contractual clauses, known as the "Rules on Containers". Those associations explicitly referred to the broad unit certified by the National Labor Relations Board in the Port of New York (Matter of New York Shipping Association, 116 N.L.R.B. 1183 (1956)), which defines the unit as:

> "all longshore employees engaged in work pertaining to the rigging of ships, coaling of same loading and unloading cargoes, including . . . hatch bosses, cargo repairmen, checkers, clerks and timekeepers and their assistants including head receiving and delivery clerks, general maintenance, mechanical and miscellaneous workers . . . marine carpenters, in the Port of Greater New York and vicinity . . .".

They repeatedly stated that ILA members, consisting of longshoremen and related crafts, including checkers, carpenters, coopers, cargo repairmen and maintenance men (to the exclusion of all other workers), have historically performed all work in connection with the loading and unloading of cargo on ships, including all related terminal services such as receipt, storage, sorting, checking, palletizing, cargo repair, carpentry, maintenance and delivery.

It is true, as Senator Nickles points out, that much litigation did follow in the wake of the 1972 Amendments, particularly in the area of shoreside coverage. But this litigation is effectively at a close. The Supreme Court has decided several cases on the extent of coverage that concerned precisely how far from the vessel, both geographically and in terms of work classifications, employees are covered under the Act.

As a result, contrary to Senator Nickles' introductory statement, the jurisdictional lines between state and federal jurisdictions for compensation purposes as envisioned by the parties in 1972 have become very clearly defined. One now does know "where Federal jurisdiction stops and State jurisdiction begins...." As the Supreme Court has repeatedly found, workers who are to be covered under the Longshore Act are not, as characterized by the sponsors, far from navigable waters and maritime activity...." Rather, they are involved in the modern-day integrated cargo handling operation that truly begins from the point where the cargo was received or transferred to the inland consignee's agent at the terminal or pier entrance and exit. Accordingly, the present bill is not needed or intended as a clarification; its only object is to constrict the existing Congressional mandate in the narrow interests of certain employers and their insurers.

Mr. Chairman, what you really have here is a concerted and disingenuous effort by the longshore employers to whittle down the benefits that were gained by very arduous negotiations in 1972 when, in return for the benefits that Congress conferred on ILA members, the employers gained some very significant advantages by the elimination of third-party suits for "unseaworthiness" together with the cross-over indemnity actions against the stevedores. I find it most interesting - and I am sure you will too - that in the midst of the verbal barrage attacking the scope of coverage under the Act as well as the quality and quantity of the benefits accruing to our members, not one employer or carrier representative that has appeared before you or will appear before you suggests or even hints that in consideration for limiting the present coverage or reducing or containing the cost of the present benefits, third-party suits and indemnification be reinstituted - the quid pro quo for which the ILA bargained.

The sponsors complain that what was achieved in 1972 "was far from the balance." They claim that concepts were introduced whose consequences were ignored that all sort of unanticipated costs, litigation, uninsurability, delays, etc. "crept into the amendments," suggesting that Congress legislated blindly and in a vacuum.

If indeed this were the case -- and I have no reservation in arguing that it was not -- then a simple solution suggested by the above statement by the sponsors is readily available. We established what was ostensibly "in balance" prior to the amendments. Let us all revert to the situation as it existed before 1972 by erasing the imbalance, and let the longshoremen sue under the doctrine of "seaworthiness"; let the longshore employers seek their remedies against the shipowners; and let the longshoremen, were intended to be the major beneficiaries under this Act, as indicated by its title and provisions, seek to defend themselves as best as possible against the financial and other impacts of disabling injuries, whether related or unrelated to their jobs. Of course, those employees then would obviously require greater rates of pay and benefits in order to develop those reserves that would take the place of the differential between the inadequate state and the federal compensations in the event of injury. I do not say this facetiously. I will not take up your time to give a chapter and verse account to prove the well acknowledged fact that longshoring is probably the second most dangerous occupation in this country, second to mining; or that longshoremen, whether or not wearing hardhats, are still working in the next to last decade of the twentieth century in such ludicrously unsafe working conditions that each and every one risks life and limb every time they enter the terminal to go to work.

Just look at the statistics which were produced by the Employment Standards Administration of the Office of Workers' Compensation Programs of the Department of Labor for the fiscal year 1980. These show that the number of accidents reported for longshore and harbor workers numbered 210,872, the highest it has been not only before the amendments but since the amendments were enacted in 1972. All these statistics may seem surprising to you but they're not to me. This is no more than a demonstration of the inevitable result of exposure to toxic and chemical wastes that are unlabeled and uncontrollable at the moment of an accident; of containers that fall apart on the docks from age and lack of care; of equipment not properly inspected if inspected at all; of the stresses and strains of moving cargo about the terminals -- and not just aboard the ships -- while preparing for loading aboard vessels or to be picked up by inland transporters; of cables that snap; of the failure of employers to provide adequate traffic control; and of the myriad other situations which our members either cannot anticipate or even if they can anticipate cannot avoid because no safety features are built in by those who do have the means and the resources to do so. Progress while not undesirable in itself, means new and greater hazards in the workplace as the sizes and forms of the new means of transportation by vessel are incorporated into the system.

In this regard, the committee should be aware of the mass productivity gains that have been made since 1972 by ILA employers at the specific expense of longshoremen and their livelihoods. As an example, I refer you to the Port of New York, which has been the repeated focus of various statistical studies on costs of premiums and claims.

The carriers' and stevedores' representatives, in their briefs to the Courts in the cases to which I earlier alluded, repeatedly make the point that in 1958, prior to containerization, longshoremen performed approximately 43 million man hours of work handling 12 million long tons of cargo. At that time, productivity in the Port of New York averaged about 0.3 tons of cargo for every man hour worked. In 1977, approximately 19 million long tons of cargo were being moved in the port in approximately 19.5 million man hours - an increase in productivity per man hour of over 300%.

Containerization has had a severe effect on ILA work opportunities. It has caused a constant loss of jobs and work hours, as further verified by the latest report of the Waterfront Commission of New York Harbor covering the fiscal year 1979-1980 (Attachment 1). The attached exhibit from the report confirms that in the period June 1955 through September 1972, the longshore workforce in the port decreased from 31,574 men to 16,316. In the period September 1972 to April 1980, the registered workforce in the Port of New York further shriveled to approximately 11,500 men including warehousemen, container repairmen and other persons presently required to be registered. Of these, an average of a paltry 7,500 men are hired on a daily basis which only rarely reaches the 8,000 man mark. This is further reflected in another chart published by the Commission in its Report which shows that hirings per section of the Port have actually further decreased over the preceding fiscal year (1978-1979) (Attachment 2).

In dramatic contrast to the plummeting figures on longshore employment is the breakdown on the movement of tonnage for the immediately preceding periods (Attachment 3). In 1979, the New York Shipping Association recorded that in the period 1971-1978 the amount of containerized cargo moving through the port increased from approximately 10 million long tons to 17 million long tons while cargo on roll-on, roll-off vessels increased from 312,000 tons to 528,000 tons and LASH and barge cargo from approximately 95,000 tons to in excess of 200,000 tons. Of course, the amount of break-bulk and other cargo traditionally handled on a piece-by-piece basis, thereby generating man hours of work, dropped in an approximate inverse ratio to the cargo handled by automated procedures. The Association had estimated that the tonnage for the contract year 1978-1979 would reach in excess of 24 million total tons, which it did. This consistent increase in port tonnage parallels the increase in the use of containers and other automated equipment introduced by modern technology. As a result of this productivity, the carriers and stevedores are amassing greater tonnage, yet it costs them less and less per ton for labor.

As you can see then, Mr. Chairman, though the carriers have come to Congress complaining about the effects of the extent of the coverage on their outlays for compensation benefits, they fail to couch their claims in the true perspective of productivity. As I will shortly show, there is also a relationship between injuries, the containers, and productivity. But there are further omissions which I should report to you.

The first is that prior to 1972, a man injured on the job under the inadequate compensation of the Act as it then existed, received no more than $70.00 per week from his employer. The difference between that amount and his wages under the applicable collective bargaining agreement for the Port of New York, which amounted to $212 at the straight-time rate, was paid to him by the GAI Fund, a jointly administered fringe benefit fund to which the carriers and not the stevedores, were required to contribute directly. Under the Act, the direct employers voluntarily undertook to pay all benefits directly to the employees. As a result, there was a $30,000,000 surplus in the fringe benefit escrow funds. This substantial savings in controlling labor expenses cannot be disregarded when considering the overall cost impact of labor related outlays, including compensation.

In practical terms, this also means that the assessment rate on cargo tonnage from which the fringe benefit funds are funded, can now be reduced. This, in turn, will have the effect of attracting even further business to the Port of New York which, if consistent past history has any lessons to teach us, will mean even further productivity in the port and higher profits for the employers.

Mr. Chairman, the employers in 1972 knew what they were bargaining for. They had no delusions that the costs of running their businesses would not increase as a result of the additional coverage for which they bargained and for which they received more than fair consideration.

The contentions that the employers were suprised or unprepared for the increases in benefit costs are totally unacceptable. You must agree with me that one of the most important features of the 1972 Amendments was an increase in longshore disability benefits to meet the realities of progressively higher costs of living completely at a variance with the pre-existing benefit levels. They were intended to be a buffer to the impact on longshoremen and their families due to the sudden onset of injuries incurred in the course of their employment. The prior rates clearly reflected the inadequacy of those amounts. In effect, the companies were finally catching up for all the years of their overextended honeymoon. This was stated in one or another way throughout the Committee reports and testimony given prior to passage of the Amendments.

The proferring of all types of statistics concerning national average wages, national average claims, average numbers of accidents in industries generally within the United States, and all other references to wages, compensation and accident rates in other industries are totally irrelevant and out of place in this proceeding. I will not take your time to review the reports and related literature that were before the Congress in 1972 on the uniqueness of this industry. By now it has been established beyond all question that longshoring is a very risky business, regarded by most independent observers as the most hazardous in this country. Any recitation of comparisons elsewhere is tantamount to matching apples and oranges.

Senator Nickles refers to "fraud and abuse" under the Act. Carriers and insurers have admitted that the problems of stevedores are not confined to the Longshoremen's and Harbor Workers' Compensation Act; all workmen compensation systems are struggling under the burdens of increased claims and higher benefit levels. They have conceded that exaggerated injuries and fraud must be prevented, and the ILA certainly supports such efforts. The illogical conclusion that they try to foist upon this Subcommittee is that because of the few rotten apples in the barrel, we ought to throw the whole lot out. They would have the Subcommittee in effect jettison the benefits of the Act because of the abuses of a few. To use a hackneyed but appropriate saying, throw the baby out with the dirty water.

When the arguments posed by the various employers and carriers are compared, the true basis for the increased number of accidents and claims and related costs becomes self-evident. On the one hand employers try to demonstrate that they are controlling and containing unjustified claims by effective investigation and careful examination of records and medical reports. These very same employers contend that they are reducing the numbers of accidents occurring among their employees, such as in the Gulf states. On the other hand you have employers who, with great pretenses of alarm, cite the increases in claims in their areas, such as in the Port of New York, with corresponding increases in premiums and outlays. These employers hide behind vague and transparent claims and alibis that lay the fault for their own inadequacies and negligence at the feet of the employees.

They begin with the unwarranted presumption that claims are fraudulent unless proven otherwise; that the benefits of the Act do not provide any incentives to the employees to avoid injuries or to return to work; that the tax laws present inducements to claim disabilities. In their minds, because they cannot disprove an injury that they or their doctors cannot see with their own eyes, it is a sham. Though by their own admission they concede the inherently hazardous nature of the industry, they refuse to acknowledge that it still has the worst safety record in the nation.

A report prepared for the U.S. Department of Labor Occupational Safety and Health Administration in 1975 typically took note that a "negative incentive" for safety is the push for higher productivity and shorter loading time. It reported that:

> "[s]hipping company managements are eager to make maximum utilization of their capital investments in ships and to reduce their operating costs per shipment by keeping their ships at sea as much as possible. Stevedoring time is regarded as deadtime. Thus, from the view of the shipping company operators, there is pressure to load as soon as possible. . . The real effect of this, however, tends _not_ to be to make operations more efficient and safer, but rather to cut corners or to take chances; e.g., if equipment seems to be bad, use it rather than an alternative; if a smaller vehicle or one sling or bridle is handy, use it (at some risk) rather than get one that is larger and safer; or accomplish specific short run tasks in ways that cut corners but may not be the safest, e.g., don't use tag lines or brace a high wall of cargo or clear a space around a 'tween deck hatch before unloading, or close a 'tween deck hatch while carpenters are bracing loads in the holds, under poor light and inadequate access."

It concluded that:

> "perhaps the most subtle not readily perceived concept is the most important, however. The cost of accidents themselves for many stevedores turns out not to be a real incentive against accidents!"

Therein Mr. Chairman and members of this Subcommittee lies the real cause of the escalation of costs and benefits from which the employers and their carriers now seek relief. The employers have failed to present any tangible evidence of what their safety programs have accomplished for the $25 million or so a year that they reportedly cost.

Even to the naked eye, it must be apparent that the $25 million cost is all but lost alongside the $160 million plus expended in 1978 as compensation and medical payments by insurance carriers and self-insured employers under the Longshore Act. This comparison in and of itself serves as a very appropriate reflection of the lack of interest that the employers, in their concentration on "productivity" and "turn-around time of the vessels", have shown toward preventing accidents and thereby saving lives as well as their precious money. From the viewpoint of the ILA and the members that it represents, no man deliberately goes out on the docks looking to come home maimed or in a coffin.

If it were not for the pressure brought to bear on management by the ILA, the deaths and injuries on the piers would be even worse than their are from the time that the Amendments were set into effect in 1972. Safety codes were introduced into stevedoring operations as far back as 1930 and from time-to-time since then. These paper codes have aged in backroom files, long forgotten and neglected. Meanwhile, from 1972 to 1978, 32 men died due to accidents in the Port of New

York alone. The newspapers have recounted stories of ILA men who died in the explosions at the grain mills in Texas and who risk their lives every day when they leave their homes to work in grain docks on the Great Lakes and elsewhere. Now and then you also hear and read about other incidents, such as a large Paceco crane tipping over in the Port of Baltimore resulting in death and injuries or a ship carrying very volatile cargo blowing up at dockside killing and maiming longshoremen and seamen.

What does not, however, catch the public's attention are the day-to-day hazards that these employers allow to occur, because they have failed to live up to the maritime codes which we have been able to impose on them; because there is no effective government enforcement agency to cite them for violations of existing or non-existing standards; and because their own insurers do not require them to meet the most minimal and basic safety requirements that would prevent accidents from happening in the first place.

The stevedore employers often assert that the 1972 amendments have caused them to be even more safety conscious than in the past and to spend more time and money on safety programs. This statement begs the question since the mere spending of money on safety programs is not a guarantee that those programs are effective.

Once again, what they are not telling you is what you have to know in order to make a balanced evaluation of their claims. It is that their own negligence and lack of safety programs are causing the number of serious accidents on our docks and terminals. The ILA regularly receives reports of men seriously injured, maimed and sometimes killed when containers that have outlived their projected 15-year lives break in two and spill their contents on dock workers below. They leak noxious chemicals and splash their lethal contents on unsuspecting workers. It is a fact that more than 50,000 over-age containers are being used without the benefit of proper certification. Most of these containers are still in use today, though they should have been removed from the piers long ago and should have been replaced before they became a hazard to those handling them. The Occupational Safety and Health Administration ("OSHA") reports that there is no statute on the books regulating the use of containers and OSHA is without authority to enforce any kind of safety codes for containers. As far as OSHA is concerned, those who make their living on the docks are "forgotten people".

In addition, the ILA's Safety Director, Mr. Joseph Leonard, has repeatedly proved that ILA members have been asphyxiated and maimed because employers have not been alert to the nature, chemical composition, and interactions of chemicals being handled at the piers. There is no way of knowing even now what potentially dangerous products are standing on our piers, ready to snuff out the lives of ILA members. In many instances regulations do not exist and where they do exist they have been issued by several different government agencies. At least four major labelling systems are currently in use and all are different. There are spills all the time that are not being reported. After a spill, no agency wants to be responsible for cleaning it up because they don't know where they can dump it. As a result, longshore personnel are cleaning up spills when they shouldn't, because they don't know enough about the chemicals. A certain chemical may be harmless until it comes in contact with some other chemical and there may be as many as five or six chemicals in the same hold.

ILA men are working in holds where concentrations of carbon monoxide and other actually and potentially dangerous gases are present. Gas masks either are not provided or are inadequate to protect them from sudden, almost instant death when fumes are released. If it were not for the ILA, fume levels might never have been reduced and despite the ILA's efforts, even now they are often unsatisfactory.

ILA men are living in an environment where the employers' penny-pinching greed is always evident: throw-away pallets are being used which break up and tip over easily; where all-gas equipment instead of electric hi-lo's are being used in the fourth quarter of the 20th century; where ILA men are required to sweep up rather than vacuum tons - yes, tons - of asbestos lying around the piers and aboard ship; where they have to sweep up grain dust in atmospheres where the concentrations are so high that they border on the brink of explosion; where nerve gas rockets are required to be loaded onto antiquated, rust-bucket ships; where floating and shoreside cranes are permitted to be used that are improperly tested and are so structurally defective that they hang over our men like the Sword of Damocles.

Gentlemen, the conditions that I have just cited to you are some very few but important examples of the many day-to-day conditions under which ILA members must work. These are conditions which existed in 1972, but which the employers have failed to even begin to remedy since that time. These are conditions that cannot be solved by wearing hard-hats or safety shoes nor can they be attributed to any failure to wear them.

What you also do not see spread on the face of the bill or any supporting statement are the hidden costs to the industry and to the public that results from the absence of safety programs and the high costs of premiums. As reported by the New York Shipping Association on May 1981, the Port of New York and New Jersey has the highest waterfront costs of any port in the world: $87 per $100 in payroll costs. A great part of the drop in daily hiring to below the 6,000 man per day level is attributable in significant part to the compensation costs and, where ships have a choice they will avoid high cost compensation ports. These costs, as Senator Nickles indicates are passed onto consumer. The whys and the wherefores of this I will get to shortly.

Everytime a grain elevator explodes, a crane falls over, a container breaks apart or a longshoreman is injured onboard a vessel or the adjacent piers and terminals, valuable ship's time, costs of repair, costs of using less efficient and alternate means of accomplishing longshore handling of cargo is inevitable and must also be passed onto the public in terms of higher costs of transportation. The employers as well as the consumer could avoid these costs if the foresight and resources were applied to prevent accidents and not attribute them to longshoremen as a scapegoat.

Congress must remember that no life or limb is ever fully compensated in money. Longshoremen are the principle breadwinners of their families. Each time a longshoreman is injured and is not properly compensated he must look to other, public sources of assistance to help him through the periods of disability and especially after a fatality.

If it has been charged in the past that ILA members at times do not take available precautions or use proper equipment even when it is provided. While I do not condone such neglect, the employers, on the other hand, cannot abrogate their responsibilities where they are in possession of the knowledge, the means, and the opportunity to provide for a safer

TT

environment in which our men can work, which is beyond our members' own control. They cannot absolve themselves of responsibility by citing extreme examples of fraud; they cannot use statistics, which will support practically any point of view, to place the burden on the longshoremen for the rise in accidents and the related costs. That is the fallacy and weakness of their whole argument. If the monies that they have allegedly been spending on safety programs have been effective, then why do so many serious, costly accidents not attributable to individuals continue to occur?

I submit that there are ways that employers could do something to prevent these accidents and reduce their compensation costs. It has been shown through independent studies that in the long run reduction in accidents is most likely to come from technological innovations which, by their inherent nature, reduce the exposure of the men who are working. Examples of such technological devices are hydraulic lift gear, electric forklifts, reinforced containers and pallets, devices for handling and stacking drums as individual units without manhandling, new kinds of lashing gear which would eliminate longshoremen having to climb on top of containers with cumbersome gear and lashing lines and a whole list of other equipment. Of course, research and development in these areas would cost money. But the employers cannot see the logic that money spent in reducing accidents and reducing premiums and reducing costs for rehabilitation, disability and death are in the long run more profitable. They would rather have the best of both worlds: no safety and less liability.

Since unseaworthiness and cross-over indemnification have been eliminated under the 1972 amendments, the employers have less and less incentive themselves to initiate or to promote and follow safety programs to protect the lives and limbs of those persons whose labor are the means for their companies' existence and for their profits. Through the efforts of ILA safety personnel, a safety code governing longshoring activities throughout our jurisdiction has been formulated. All of our efforts to have the employers comply with this code have been unsuccessful.

Inasmuch as voluntary enforcement has proven a waste of time, the ILA has had to look to the government agencies to protect longshoremen and to reduce the numbers and costs of accidents. However, according to the General Counsel and Executive Director of the National Association of Stevedores, OSHA is a paper tiger. He admits that OSHA will not fine or cite employees, just as it will not fine or cite employers for violations of safety standards. Though he argues that employer safety programs are doomed to defeat before they are even instituted because employees tend not to cooperate, in the same breath he states that only 25% of injuries are due to violations of regulations enforceable under present OSHA standards.

Even OSHA has conceded that longshore safety has a low priority in its scheme of things as stated in a 1976 letter from the Assistant Secretary of Labor to our Safety Director. Nine months before the grain explosion in December, 1978 in Texas, the ILA notified the Assistant Secretary of Labor of the hazards in the grain industry. As you well know, nothing happened. There is a glaring absence of dockside inspectors due to non-funding, lack of interest, or just plain inability of OSHA to handle all of the work that has been assigned to it.

Not so long ago, some of our men walked off the job in Superior, Wisconsin on a grain loading operation because the lateral controls for the spouts that pour the grain into the holds was taken away from them. The controls were being operated by a man way up in a cab, whose visibility could be obstructed and whose attention was divided when two or more holds were being worked at a time. The National Labor Relations Board simply labeled this a jurisdictional dispute with the grain millers' union. But we knew and we are still convinced that our principal defense, that is, the absence of an enforceable safety standard, validly lies at the heart of the controversy. Even an OSHA inspector that was called to the site admitted that it was an intolerable situation, but he was helpless because no standard existed to protect the men.

The ultimate conclusion to be derived from all this discussion is that our members must have a safe place to work.

Equipment after a certain age should not be permitted on the pier. Noxious and dangerous chemicals should be properly labeled. If employees are loading fertilizers into hoppers, such as in Tampa, they should be issued masks and be required to use them. If they are required sweep up asbestos, then vacuums should be employed and employees should be properly protected. Equally important, if the employers are not going to enforce the voluntary code entered into in 1970, then we must have federal protection at the pier.

Your attention has been drawn to an exploration of the causes and costs of accidents to employees currently covered by the Act. I earnestly put forward that this Subcommittee must also consider the positive - not just the negative - ways of reducing these statistics. By this I mean that eliminating employee coverage and benefits is neither the only way nor is it the correct way of accomplishing the objectives sought by the employers and their carriers.

I have already pointed out that OSHA's effectiveness has been next to nil. However, I believe that we already have an existing safety enforcement structure in the form of Section 41 of the Act which explicitly provides for the administration and enforcement of safety on the waterfront. The bill before you would give even this moribund feature a convenient burial at sea.

Section 41, at least as written, is a very workable format but unfortunately has no teeth. As you are well aware, it, like so many other laws, depends upon proper funding to make it a reality as well as the motivation and impetus of those who administer the laws to see that they are carried out properly. I cite Section 41 because it so clearly evidences an intent by Congress to promote and enforce safety in our industry.

I therefore urge this Subcommittee take the following affirmative measures to amend the Act:

(1) That a safety code, in form or content to one established between the New York Shipping Association and the ILA in the Port of New York, be incorporated verbatim or in its substance into the Act. It would give the Secretary the necessary guidance and sense of clear congressional mandate presently missing from Section 41 of the Act. An enforceable code is the logical and required corollary to the two other features of the Act: namely, it will contain the vicious circle of accidental injuries and compensation, for which the Act now stands as a cushion but not as prevention or cure.

(2) That Congress mandate the Secretary of Labor, whether under Section 41, OSHA, the Employee Standards Administration or any other component of that department, to promulgate reasonable and achievable regulations consistent with the code addressed to all waterfront activities, whether

aboard ship or at the dock and terminal. It must give him the financial and other means to police and administer those statutory administrative standards by hiring and assigning adequate numbers of dockside inspectors, by proper and diligent inspections, by statistical analyses and other means at his disposal, by citations and substantial fines and other impositions and restraints that will make the employers - no less than the employees - live up to their responsibilities and thereby reduce the incidence of accidents and the costs of their aftermath. It should require the Secretary to periodically report to the Congress whether the employers are living up to their safety obligations and, if not, what his department is doing about it.

The 1972 amendments were enacted with the concurrence of all concerned - union, employers and Congress - to rebalance the compensation system in this industry. The burden to disprove the workability of that new balance (or, "bargain") rests upon those who challenge it. That challenge has not yet been met before this subcommittee and cannot be met until it is determined that the challengers have met their own responsibilities to make it a workable system. That includes a viable and honest effort to reduce the causes of accidents for which compensation is required to the full.

In addition to the foregoing, I respectfully submit to this subcommittee that the self-regulatory abuses associated with the insurance industry have been a prime factor in the so-called explosion of costs experienced by the employers. I am sure that most, if not all, of you are aware that in the majority of states the insurance carriers themselves set the rates that they charge employers as well as to other customers in other insurance lines. For the most part, though these regulating bodies work under the supervision and protection of state laws and agencies, they are rarely challenged or challengeable. As a result, a highly significant portion of every premium dollar charged is attributable to administrative expenses and profits that are built in like a self-perpetuating pyramid. It is not unusual that as much as 40 to 60 percent of every premium dollar never reaches the beneficiary.

The best way that I can demonstrate this fact of life is through a report compiled by the New York State AFL-CIO entitled, "The Mystery of Insurance Rates and Workers' Compensation" dated January 1979 (Attachment 4). It shows in great detail exactly what I mean when I use the term "self-regulatory abuse." In contrast, I am also submitting another report prepared for the Washington State legislature by the Washington State Labor Council, AFL-CIO entitled, "Three-Way Workers' Compensation, Labor's Point of View" (Attachment 5). This study shows that when the setting of rates is not left up to the self-interests of those who charge the premiums, but instead is handled by a state agency that has the interest of its citizens and workers at heart, the amount expended even exceeds the amounts collected under prudent management. Therein lies an important key to unravelling the financial problems that have confronted the industry since 1972.

Rather than dismantle a landmark achievement of Congress, the ILA further proposes that there is more than sufficient reason at this time to enact certain additional affirmative amendments to the Act that will close the loopholes and inconsistencies that were left by Congress in 1972. These will correct certain glaring inequities and irrationalities which a uniform compensation system was intended to accomplish in the first place.

Here is a prime example: The ILA firmly believes that the current exception from coverage of state-operated facilities, which especially prevail in the Southern states, should be eliminated. There is no rational basis for excluding a state from coverage under the Act where the state is engaged in what essentially and realistically is a proprietary rather than a governmental function. When a state operates a marine terminal facility it is engaged in a commercial profit-making venture, as distinguished from a non-profit government service such as fire or police protection.

It is no secret that these state-operated docks, characteristically using men not represented for bargaining who work under conditions dictated by the state, are performing work diverted from the private commercial operators in those ports. The state employees work under virtually the same risks and hazards as their brothers who share the same or adjacent facilities. While they are subject to the same injuries for the identical types of accidents they receive ludicrous rates of compensation, again dictated by the state. For example, in 1979, when the maximum compensation benefits allowed under the federal act for temporary total disability was $426.00, a longshoreman suffering the same injury in Texas at a state dock looked forward to getting no more than $105.00 per week to tide him over. In Alabama, in 1979, a longshoreman who incurred such an injury could expect no more than $128.00; if he had been working at a state dock in Georgia, he would have had to be satisfied with $110.00; in South Carolina with $85.00; and in North Carolina with $178.00.

Such a state of affairs makes a mockery of the principle of uniformity. Once again, the rejected notion of "fortuitousness" comes into play. Though a state employee's relationship to the vessel and the cargo has no more or less proximity or connection than that of the private contractor's employee, he simply has the "bad luck" of having the state as his employer, though it is the competitor or supplementor to the private commercial stevedore.

So long as Congress is prepared to recognize that longshoring no longer is confined to the hold of the vessel, then it should - indeed must - treat all individuals engaged in the handling of maritime cargo at the docks and piers and ports throughout our country, irrespective of their employer's identity, as the same. As governments tend to engage in proprietary functions with great frequency by intruding into private sectors of activity, they must share the risks and responsibilities of the private contractor.

Another way of looking at this is to recognize that the lower compensation costs, which are set by state agencies, give the state employers greater opportunity and incentive to wean away work from the nearby commercial facilities, which is not the purpose of government. The state longshoremen and warehousemen should not be permitted to be the whipping boys on whose backs the states are able to take over increasing portions of waterfront work and profits. As as appellate court found, this is not an activity that was intended to be protected under the Eleventh Amendment; states must be on the same footing as their competitors, whether for purposes of bargaining or compensation. We therefore ask this Subcommittee to recommend that the governmental exception be removed from the Act.

While we are on the subject of uniformity may I point out that while the bill's sponsors make much ado about the compensation paid to longshoremen which they would have decreased to lesser percentages and so on, nothing whatever is said as to changing the compensation that is afforded to federal employees, including members of Congress, when they are injured. These benefits far exceed those given by the Act to longshoremen in virtually all respects. Thus, according to a February 1981 publication of the Department of Labor's Employment Standards Administration, Office of Workers' Compensation Programs entitled, "State Workers' Compensation Laws," employees of the United States under the Federal Employers' Compensation Act receive a maximum of $722.78 if they are injured on the job and are provided benefits for permanent total or for partial disability. The benefits for their surviving spouses and children are based on 75 percent of the pay of specified grade levels in the federal civil service. These are weekly -- not monthly or one time benefits. I do not suggest that what is sauce for the goose is also sauce for the gander in every case. However, my members only look to what Congress has said they are entitled.

Another aspect of the Act's coverage which has been given short shrift since its enactment has been the subject of rehabilitation. The unions no less than Senators Nickles and Nunn and the employers recognize that rehabilitation is very important not only in getting a man back on his feet and in restoring his dignity, but also in cutting the costs of benefits and the financial effects of disabilities.

Approximately 50% of injured longshoremen rehabilitated by the Office of Workers' Compensation Programs

("OWCP") are returned to light duty employment in the longshore industry. They are rehabilitated as forklift operators, gang bosses, checkers and light duty longshoremen. The other 50% are trained and placed in physically less demanding occupations outside the industry. Once these men are back on their feet, whether in or out of the industry, the costs to the employers are reduced appreciably.

Nevertheless, there is no provision in the Act which requires an employer to pay compensation to a longshoreman while he is undergoing a rehabilitation program. It is given - or denied - at the pleasure of the employers. Many an injured longshoreman is subjected to additional anxiety in planning for and undergoing rehabilitation simply because of the uncertainty of the length and amount of the compensation payments which he can receive. Indeed, he is discouraged from undergoing rehabilitation under these conditions, even though the employer has as much to gain from the employee's rehabilitation as the man himself, if not more. The employers cannot be heard to complain if their own acts prolong the recovery periods and consequent costs. If the rehabilitation program is ever to be effective, the Act must realistically deal with the injured worker's financial needs and those of his family.

As a solution, the ILA *also proposes* that the Act be amended to *require* that *temporary total disability* be paid *during rehabilitation*. The $25.00 weekly maintenance allowance must be increased so that the injured worker's immediate financial needs are covered. To insure compliance with the rehabilitation program, the Act should also provide that such benefits should be cut in half for an employee's refusal, without good cause, to undergo or to continue rehabilitation wherever it is found to be feasible.

Other statutory provisions have, in practice, become stumbling blocks to effective coverage of longshore workers by the Act. Under §7(d), an employee is not entitled to recover expenses for treatment or services unless he has requested his employer to furnish such treatment or services or unless he has requested his employer to authorize a provision of those services by a physician selected by the employer. In practice, this provision unjustly penalizes claimants. The sole test should be whether the services or treatment were "reasonable and necessary". Such a standard would permit objective determination of what expenses are excessive and which are properly incurred.

Admittedly, terms such as "reasonable and necessary" cannot be reduced to an exact amount but at least such terms impose some limits on the employer and would effectuate the requirements of §7(a) of the Act that the employer:

> . . . shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches and apparatus, for such period as the nature of the injury or the process of recovery may require. 33 U.S.C. §907(a)

Section 7(d) also places the burden on the claimant to furnish a medical report within ten (10) days following the first treatment. If such report is not furnished, the claim is not valid and enforceable. It is inequitable to require that the claimant furnish this report when the report must be written by a third party, the treating physician, over whom the claimant has no practical control. As long as there is no prejudice to the employer by the failure to submit such report, the claimant should not be penalized for such failure.

Sections 12 and 13 of the Act deal with notice of injury or death and the filing of claims. Section 12(a) states that notice of an injury or death must be given within thirty (30) days after the date of such injury or death or thirty (30) days after the claimant should reasonably have been aware of the relationship between the injury or death and the employment. Section 13 sets forth a time limitation of one year on the filing of claims for disability or death. However the filing must be done within one year of the injury or death and not one year from the date of disability even though the claim filed is a claim for compensation for disability or death and not for injury. The text of the statute as currently in effect means that the time limitation begins running as of the date of injury even though no disability has ensued as of that date. It is logically inconsistent for the time limitation for compensation for disability to be tied to the date of injury rather than to the date of disability.

Any prudent claimant who does not wish to jeopardize the possibility of receiving compensation due to the running of the time limitation finds himself forced to immediately give notice and file a claim as soon as an injury occurs, even though he may not be immediately disabled or even though he may not be immediately able to establish a causal relationship between the injury and his employment. As a practical matter, if an employee files a claim before the onset of actual disability, the employer can request an immediate hearing. The employee cannot yet establish disability, thereby forfeiting any opportunity for compensation at a later date when disability due to the injury occurs.

The time limitation should be eliminated. So long as the employer knew of the source of the injury, the possibility of a fraudulent claim is avoided. In addition, it would seem fair to require that notice be given not within a certain prescribed unit of time (such as thirty days) but rather one based on the point in time when the claimant becomes aware or reasonably should become aware of the relationship between the injury or death and the employment.

Next, §33 provides that acceptance of compensation triggers an assignment to the employer of all rights of the person entitled to compensation to recover damages against a third person. The plain language of this statute is clear: unless the longshoreman brings an action against a vessel owner within six months he loses the right to bring such action and must rely on his employer, the stevedore, to bring the action, if one is to be brought. In most cirumstances, the longshoreman would be entitled to a portion of any recovery had by his employer.

It has been held in the case of Bandy v. Bank Line Ltd., 442 F.Supp. 882 (E.D. Va. Norfolk Division 1977) that where a conflict of interest deters a stevedore from full pursuit of a claim for injury suffered by a longshoreman and assigned to it under this subsection and therefore does not act to pursue the claim, the longshoreman retains a right to proceed in his own behalf beyond six months after a compensation award. The conflict of interest, the court held, must be established by proof of particular facts in the case at bar that operate to deter the employing stevedore. The court noted that the proof is not limited to establishing a common insurance carrier. Other facts may be shown that contribute to a stevedore's reluctance to pursue a non-frivolous claim against a vessel owner.

It is clearly more fair if the automatic assignment provision is amended to also require that if the employee makes a demand upon the employer to commence an action within thirty (30) days after the assignment and if he fails to do so, then the assigned claim reverts to the employee. It can contain a condition that any recovery by the employee against the third person will be set off against the compensation received.

In addition, under the present enactment, if an employer refuses to pay a claim and the claimant settles with the third person for an amount less than the amount of compensation to which such claimant would be entitled, the employer is liable for the difference between the amount received and the amount of compensation to which the claimant is entitled, but only if the claimant has received prior authorization for the compromise prior to settlement. A more realistic amendment is needed to provide that if the employer refuses to pay, then the claimant can settle with the third party without employer authorization.

Mr. Chairman, with respect to the amendment of the Longshoremen's and Harbor Workers' Compensation Act, I further propose that provisions be enacted that would provide that there shall be no time or dollar maximum limitations under the total amount of compensation payable in case of death or total disability and that would provide that compensation due to disease shall not be denied on the basis that the disease is not peculiar to or characteristic of a particular occupational employment or is not the result of an accident or the onset of such a disease related to any accident or accidental occurrence or on the basis that it does not appear on a list of compensable diseases or on the basis that it is an ordinary disease of life or is a communicable disease, if the risk of contracting such a disease is increased by the nature of the employment. I would also propose that provisions be enacted that would provide that a disabled employee shall be entitled to select a physician for diagnosis and treatment from all physicians licensed by the state or from a group or panel of physicians designated by the applicable compensation agency and that would allow an original claim for compensation for disability and death to be filed within two years after the onset of disability or death rather than injury or illness.

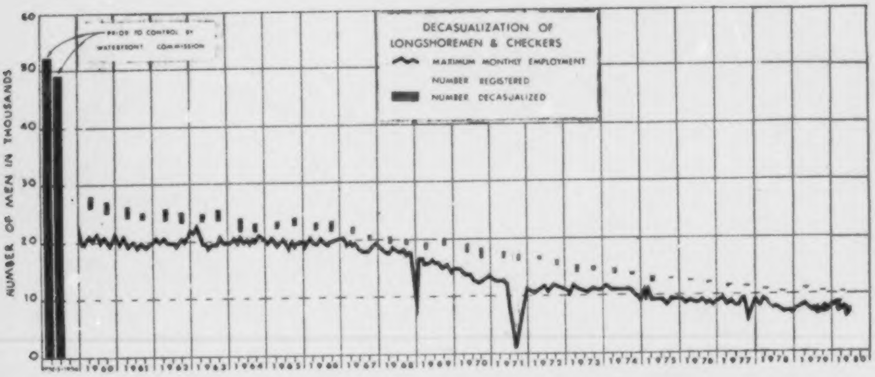
These are the aspects of the administration and enforcement to date of the Act which are the subject of my testimony. The broadened perspective of disability compensation under the Act as amended in 1972 took into account certain rights that the longshoremen had prior to 1972, as well as the commensurate liabilities of the various employers, which were key components of the "bargain". The rights of the 110,000 longshoremen whom I represent can be protected only if the amendments of S. 1182 are rejected.

Organizations such as the National Association of Stevedores do not have to contend with the everyday realities of the waterfront. They do not negotiate any contracts. The bulk of their constituents' officials do not face first hand the terrors and tragedies of the conditions that they permit to exist. The insurance carriers and their representatives certainly do not have to undergo the pain, suffering and traumatic effects on their families as do our members. Their concerns are purely matters of dollars and cents and they are prepared to leave the injured worker to his own recourse. Their attitude demonstrates for this Subcommittee their lack of fundamental social and humane responsibilities. It is an attitude bottomed on the hard-nosed concept that if a loyal and productive worker and his family cannot live on what they are willing to pay, then that is just unfortunate. They would have the taxpayer take-up the welfare burden that they shed.

I am confident that neither the members of this Subcommittee nor that the Congress as a whole can be so callous and insensitive to the values of human life and limb and to the resulting drain on the Treasury. I can assure you that I and my colleagues would never reduce ourselves to their level to get out of a fair and freely-made bargain, particularly one over which we have enough control to make sure that it comes out to our equal, if not to our overriding advantage.

Thank you.

ATTACHMENT 1



DECASUALIZATION OF LONGSHOREMEN AND CHECKERS

		Number Decasualized	Remaining Registrants
1st decasualization	June 3, 1955	7,141	31,574a
17th decasualization	May 10, 1963	1,182	25,218
18th decasualization	October 22, 1963	1,523	25,997
19th decasualization	April 10, 1964	2,096	24,172
20th decasualization	October 15, 1964	1,715	23,084
21st decasualization	April 16, 1965	934	23,796
22nd decasualization	October 7, 1965	581	23,920
23rd decasualization	March 31, 1966	1,070	23,332
24th decasualization	November 7, 1966	1,226	23,471
25th decasualization	March 31, 1967	1,142	22,100
26th decasualization	October 6, 1967	954	21,515
27th decasualization	April 12, 1968	903	20,901
28th decasualization	October 18, 1968	770	20,384
29th decasualization	April 22, 1969	999	19,973
30th decasualization	October 3, 1969	1,022	20,627b
31st decasualization	April 13, 1970	1,098	19,512b
32nd decasualization	October 30, 1970	1,012	18,651b
33rd decasualization	April 2, 1971	715	18,115b
34th decasualization	September 30, 1971	514	17,742b
35th decasualization	March 30, 1972	227	17,626b
36th decasualization	September 27, 1972	523	16,316b
37th decasualization	April 9, 1973	930	15,368b
38th decasualization	September 27, 1973	330	14,792b
39th decasualization	March 25, 1974	423	14,409b
40th decasualization	September 26, 1974	271	14,143b
41st decasualization	March 27, 1975	425	13,726b
42nd decasualization	September 25, 1975	156	12,962b
43rd decasualization	March 25, 1976	194	12,602b
44th decasualization	September 23, 1976	181	12,303b
45th decasualization	March 24, 1977	174	11,978b
46th decasualization	September 22, 1977	168	11,723b
47th decasualization	March 31, 1978	120	11,370b
48th decasualization	September 29, 1978	126	10,995b
49th decasualization	March 30, 1979	150	11,321b,c
50th decasualization	September 28, 1979	124	10,956b,c
51st decasualization	April 3, 1980	115	10,701b,c

a Does not include craftsmen whose registrations were required on or after May 27, 1957.

b Does not include warehousemen, container repairmen, and other persons required to be registered on or after September 1, 1969.

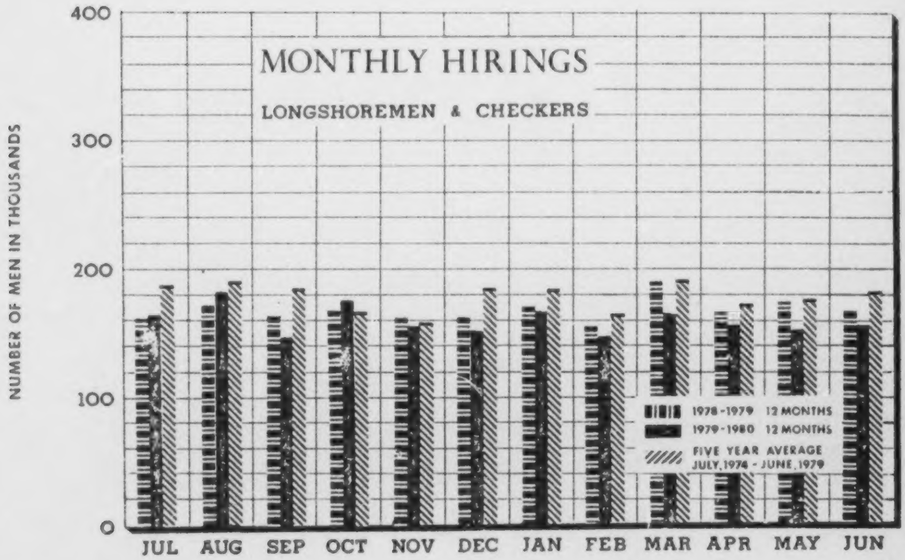
c Includes persons registered on a temporary basis to meet special and emergency needs.

ATTACHMENT 2

EMPLOYMENT INFORMATION CENTERS

Showing Comparison of Hirings for the fiscal years ending June 30, 1980 and 1979

Center and Location	Piers and Areas	HIRINGS		Increase or Decrease	% Change	% Share of Port Employment	
		1979-1980	1978-1979			1979-1980	1978-1979
Manhattan 261-281 Hudson St.	Manhattan	97,360	107,930	-10,570	- 9.79%	5.06%	5.35%
Brooklyn 5914 3rd Avenue	Brooklyn	714,210	788,193	-73,983	- 9.39%	37.10%	39.03%
Staten Island 22 Wave Street	Staten Island	94,084	85,513	8,571	-10.02%	4.89%	4.23%
Port Newark 117 Tyler Street	Port Newark, Port Elizabeth & Perth Amboy	787,474	777,469	10,005	1.29%	40.91%	38.50%
Hudson County 111 Newark St. Hoboken, N.J.	Jersey City and Bayonne, Hoboken, Weehawken & Edgewater	231,781	260,409	-28,628	-10.99%	12.04%	12.89%
TOTAL — NEW JERSEY		1,019,255	1,037,878	-18,623	- 1.79%	52.95%	51.39%
TOTAL — NEW YORK		905,654	981,636	-75,982	- 7.74%	47.05%	48.61%
PORT WIDE TOTALS		1,924,909	2,019,514	-94,605	- 4.68%	100.00%	100.00%



ATTACHMENT 3

NEW YORK SHIPPING ASSOCIATION, INC.

80 BROAD STREET • NEW YORK N Y 10004 • [illegible]

November 14, 1979

Thomas W. Gleason, Jr., Esq.
One State Street Plaza
25th Floor
New York, New York 10004

Dear Mr. Gleason:

The attached NYSA tonnage data is supplied from computer run-offs for the years indicated. You will note 1978 fiscal year, which covers the period October 1, 1977 to September 30, 1978, included the two months partial strike. We estimate approximately 2 million tons were lost during that strike. We presently estimate tonnage for the contract year 1978-79 to reach 24,200,000 total tons.

The accident statistics were compiled by NYSA Safety Department. If you need additional or more detailed information, please let me know. (Attachment # 5)

Very truly yours,

J. M. Haynes

Encs.

DETAILED TONNAGE DATA

√
8-1-71 to 11-28-71

etailed Billable Tons:	FY 1971	FY 1972	FY 1973	FY 1974	FY 1975	FY 1976	FY 1977	FY 197
inanas	19,006	93,943	443,453	273,483	332,299	234,731	269,817	274,
eakbulk	11,807,386	7,964,943	7,522,004	6,848,447	5,374,972	4,519,362	4,099,007	3,357,
ıitized	700,788	450,253	434,523	418,544	371,105	439,641	406,861	250,
ontainerized - Stuffed	2,785,990	2,051,605	2,785,341	3,594,669	3,699,981	4,117,431	3,772,809	3,641,
ontainerized - Inact	7,280,809	8,418,872	12,176,848	13,302,752	10,561,585	11,899,667	13,722,353	13,402,
ll On - Roll Off	312,766	998,915	1,165,258	1,272,663	842,849	219,218	533,980	528,
ish - Barge	94,713	170,345	236,263	234,338	338,375	267,580	87,791	202,
eel	174,883	75,691	208,218	96,906	65,568	22,309	37,903	48,
hicles - RO-RO/Lifted	584,856	585,137	635,973	615,768	466,187	499,270	468,780	505,
her	3,473	44,449	151,928	154,829	231,570	264,707	222,405	140,
TOTAL	23,764,674	20,854,159	25,759,814	26,812,403	22,284,490	22,483,922	23,621,711	22,353, 22,366,

o adjustments have been made to make each year comparable for
ierto Rican tonnage, automobiles, newsprint, bananas, fruit, steel, etc.

atistical Data Compiled from Tonnage Report Input.

ay 29, 1979

ATTACHMENT 4

NEW YORK STATE AFL-CIO
99 WASHINGTON AVENUE (Suite 805) • ALBANY, N. Y. 12210 • PHONE 436-8516

RAYMOND R. CORBETT
President

E. HOWARD MOLISANI
Secretary-Treasurer

LUDWIG JAFFE
Director of Legislation

The Mystery of Insurance Rates in Workers' Compensation

(Paper on workers' compensation costs submitted by the New York State AFL-CIO to the New York State Insurance Department at the hearing on December 21, 1978)

January, 1979

INDEX

Chapter		Page
I	Redundancy of premium rates in times of inflationary developments.	5
II	Excessive expense loading of the premium rates.	7
III	Failure to account in the rate-making procedure for income from investment and unutilized reserves.	18
IV	Excessive Litigiousness of the carriers	27
V	For an Exclusive State Fund	30
VI	Conclusions and Recommendations	34

Workers' compensation is the oldest form of social insurance. Unfortunately, during the 65 years since its inception, the system has deteriorated to such an extent that, today, it is considered the most antiquated field of our social insurance system. One of the main reasons for this obsolescence is the use of the extremely costly private insurance mechanism, which is the principle obstacle to the minimization of other inadequacies of the program.

The time has come to re-orient and modernize the existing financial structure of workers' compensation. In its present form, the system is-beset with many shortcomings and inequities as well as incredible social and economic wastes that can be eliminated by the establishment of an exclusive state fund.

If, however, compensation insurance with private carriers is to be retained, an assumption that we by no means accept, it should be pruned of all gimmicks that tend to increase the overhead of the arrangement and give the insurance carriers an even greater share of the profits.

Because workers' compensation is an important system and because the insurance is compulsory, unwarranted or inequitably distributed costs are legitimately a matter of public concern.

We hope the following study will make a significant contribution to a better understanding of the problems of financing workers' compensation, and will provide a basis for legislative and administrative decisions based on the eleven recommendations contained therein.

Section 183 (b) of the New York Insurance Law requires that workers' compensation insurance rates be "reasonable and adequate for the class of risks to which they apply." That is, they shall produce premiums sufficient to (1) pay indemnity and medical benefits, (2) cover necessary expenses, and (3) provide a reasonable profit.

Section 184 of that law requires that all rates be filed with and approved by the Superintendent of Insurance, who, under the provision of Section 186 Par. 2, can order that such rates be adequately adjusted if he finds them "excessive, discriminatory, inadequate or unreasonable."

Pursuant to the authorization contained in Section 181 et seq., the function of making workers' compensation rates in New York has been practically delegated by the carriers to the New York Compensation Insurance Rating Board. This Board is, in theory at least, a voluntary association of insurers licensed by the State Insurance Department to make compensation rates. The law does not require a carrier to become a member of the Rating Board, but "economic necessity induces all companies to be members of the Rating Board, or at least, to authorize it to make and file rates for them."[1]

Compensation insurance in New York is written by approximately 70 stock companies (38 percent), 31 mutual companies (33 percent) and the State Insurance Fund (29 percent). Among the private companies ten dominate; they write more than 56 percent of the workers' compensation market in New York.[2]

The law requires all members of the Rating Board to adhere to the rates filed by it. The exceptions are the State Fund, exempt from regulation by the Insurance Department, and those cases in which, at the request of the insured employer, higher rates were permitted for particular risks. To be sure, insurers may, with the permission of the Superintendent of Insurance, apply a uniform percentage deviation to the premium produced by the rates filed by the Rating Board. But as Moreland Commissioner C. S. Hamilton tartly observes, "it does not appear that any compensation insurance carrier has ever applied for permission to use a percentage deviation."[3] It is evident, therefore, that with the exception of lower rates charged in certain instances by the State Fund, rate competition in workers' compensation insurance practically does not exist at all.

This almost unbridled control by a handful of carriers over the rate-making process, combined with the appalling lack of pertinent data and statistics, makes a thorough assessment of the adequacy of workers' compensation costs very difficult. We do not consider ourselves experts in intricate and highly technical questions involving the rate-making process. Neither do we pretend to understand the wilderness of actuarial prognostication and guesswork. But one thing is sure. Facts are stubborn and they cannot be shifted and changed. It is these facts that are the basis of our position and permit us to arrive at some very significant findings and conclusions that shed sufficient light on [illegible] workers' compensation costs, wrapped in the riddle of the insurance rate-making process.

The compensation insurance rate consists of two fundamental components. One part, called the pure premium, is the portion to be used for the payment of expected claims. The other part, called the expense loading, should produce the amount necessary to defray the expected expenses of the insurance company assignable to workers' compensation insurance. These universally accepted difinitions, combined with the clear provisions of the law that rates may not be "excessive, inadequate, unfairly discriminatory or otherwise unreasonable", should be sufficient to assure that the main bulk of the premium dollar goes to the victim of work accidents and their families and not to brokers, agents, officials or stockholders of insurance companies.

Unfortunately, the experience with the provision of workers' compensation, through the purchase of private insurance, has fallen short of what was rightly expected when the law was put into effect some 65 years ago. The insurance companies, believing that underpayment and undertreatment were a quicker route to riches, have, in general, been indifferent to organized efforts to increase benefits and improve the quality of care available to injured workers. In most of the cases, they actually have stood in opposition. While workers' compensation benefits have become pitifully inadequate, the cost has remained disproportionately high in relation to benefits paid, with retention rates averaging more than 40 cents on every premium dollar.

In their classic book on workers' compensation, Herman and Anne Sommers note that "Overhead costs -- insurance, legal fees and administration -- consume about half of the total cost of compensation. This means that employers are paying about twice as much as their employees obtain in benefits. The cost of insurance is the major element in this overhead."[4]

It is the cost of workers' compensation insurance that is, to a great extent, responsible for the deficiencies in the entire system. For on the one hand, it saddles industry with a needless burden and on the other hand it siphons off funds that otherwise could be devoted to a liberalization of the protection afforded. A closer examination of the components of these costs clearly points to the factors accountable for the inflated overhead cost.

In our view, there are four fundamental factors that must be blamed for the fatal defects of workers' compensation insurance with private carriers.

I. Redundancy of premium rates in times of inflationary developments.

II. Excessive expense loading of the premium rates.

III. Failure to account in the rate-making procedure for income from investment and unutilized reserves.

IV. Excessive Litigiousness of the carriers.

I Redundancy of Premium Rates in Times of Inflationary Developments.

There is no question that the existence of statutory ceilings on weekly benefit payments in a period of continuous rise of the wage levels has caused excessive premium rates. Since premiums usually are charged as a percentage of the total payroll, a rise in wage levels during the period for which manual rates are in force will automatically result in a larger premium income than that which is statistically expected, and because of the benefit ceilings, this excess in premium income will not be balanced by equivalent increases in losses. This result is amplified by the fact that the basis of the standard rate-making process is past policy-year experience. Therefore, there is always a lag between the past experience and the date of the revision. It is doubtful whether the introduction of a "rate level adjustment factor" alleviated this shortcoming, especially in cases of non-participating stock companies with their policy-year losses consistently lesser than their calendar year losses.[5]

Furthermore, the rating structure treats expenses as a percentage of the amounts paid out in benefits which adjusts itself automatically to benefits paid out. Hence, the higher the benefits the greater the total amount of the fund allowed carriers for paying their operating expenses. While certain items of expense, such as commissions and taxes, vary directly with the total premium, all other claims expenses of the carriers constituting at least 50% of the expense loading are not affected at all by increases in the benefit level and thus contribute to another windfall to the carriers.

No wonder, therefore, that this peculiarity of the rate structure gave Prof. Kulp, a noted authority on workers' compensation insurance, occasion to note that "inflation, with its automatic effect on payroll volume and, in turn, in premiums is proverbially kind to compensation insurers: benefit payments increase although not at once and not necessarily in the same proportion."[6]

II Excessive Expense Loading

According to rates filed by the New York Compensation Insurance Rating Board, the following table sets forth elements of the expense loading factor:

Administration and Payroll Audit	7.0%
Inspection and Rating Bureau	2.0%
Acquisition	17.5%
Profit	2.5%
Taxes, Licenses and Fees	2.5%
Loss Adjustment	8.4%
Total Expense Loading	39.9%
Pure Premium	60.1%
Total Premium	100.0%

a) Expense Loading Geared to Most Expensive Carriers

It must be noted that all these expense items, with the exception of taxes, are a mere estimate based upon guesswork rather than sound judgment. They are, in general, fixed in terms of the average of countrywide expenses and not in terms of the actual costs of these items in New York, although average expenses would probably be smaller in New York than in many other less industrialized states in which business is thinly distributed.

The calculation of the loading factor, traditionally based on the experience of the most expensive and less efficient carriers, protects the survival of the latter and guarantees large profits to the efficient.

As Prof. Monroe Berkowitz of Rutgers University states:

> "...another important reason for the high proportion of premiums allocated for expenses, especially for acquisition costs, is that loadings are set on the basis of the average expense items of the stock companies. The various rating plans reduce the amount of these expense items for the large risks, but if the acquisition loadings were reduced drastically for all risks, some stock companies

> which operate through brokers would probably be eliminated from the field. To prevent this, rates are set so that the stock company which is of average, or less than average, efficiency can find it profitable to operate within the state. As in any other rate regulating procedure which allows the marginal operator to exist, the more efficient units, under the set rates, may be cutting the melon."7

b) Acquisition Costs

The largest single item of the expense loading is the 17.5% acquisition expense, uniformly fixed despite disparity in acquisition costs between the two basic types of private insurance carriers. Stock companies sell the overwhelming proportion of their policies through agents who receive a prearranged rate of commission (usually 10 percent of premium). Mutual companies sell most of their policies directly through salesmen employed by the company at salaries. Consequently their acquisition cost item is much lower than that of stock companies. The New York Insurance Department's analysis of nationwide expenses for 1976 reflects this difference in acquisition costs existing between stock, mutual and the State Insurance Fund.[8]

Stock Companies	9.3 Percent
Mutual Companies	4.8 Percent
State Insurance Fund	0.5 Percent

However, uniform manual rates are geared to the most expensive carrier. Since all private carriers are allowed to charge the same manual rates, they all benefit by the rate fixed for New York State with a 17.5 percent acquisition expense, regardless of whether business is secured through brokers, salaried representatives or direct writing. It must also be noted that workers' compensation insurance is a well-seasoned type of insurance which has been compulsory for most employers for about 65 years. Why then should commissions and brokerage fees under this business be as high as 17.5 percent, year in and year out? "Are the services of agents selling compensation insurance worth such annual commission", asks Prof. Reede in his classic book on workers' compensation.[9]

W. W. Greene, a high official of a stock company, addressing the Casualty Actuarial Society in his capacity as President of this group, pointed out that agents' services are worth less to large than to small insured employers and that this should be recognized by graduating rates of commission. Since he urged this course of action, a very moderate degree of graduation has been introduced, but the expenditures of stock companies for acquisition remained rather constant. This hardly represents the program advocated by Greene.

> "Acquisition costs," he contended, "should be drastically reduced. The reduction should not be uniform for risks of all sizes, but rather should be graduated according to size of risk as measured in terms of premium...*it is my belief that commission scales in the compensation business have been higher than is warranted by the compulsory nature of the coverage*."[10] (our emphasis.)

c) Operating Costs in Workers' Compensation and Other Health Insurance Plans

One need only compare the cost of workers' compensation with the costs in group accident and health insurance to demonstrate the great need for a radical change. Workers' Compensation is actually a compulsory form of group insurance and it could only be expected that its costs would be comparable with costs in private group accident and health insurance Yet its administrative costs are typical not of group insurance, but of individual forms of insurance which require separate sales as well as underwriting and administrative activities for each insured person and, therefore, the costliest form of insurance. In group coverages, the total overhead has been reduced markedly in recent years to about 17.5 percent on the average and to less than 5 percent in some large groups; the commissions are relatively moderate and even greatly reduced after the first policy year. Moreover, commissions paid to brokers for sale of disability and health insurance run out at the end of ten years. Under compensation insurance, they are paid indefinitely If the rule of lapse of commissions after 10 years had been in effect in workers' compensation, the costs of the companies for commissions would undoubtedly be much less than they are presently.

W. F. Dodd, in his book on administration of workmen's compensation, has argued that "any services which may be rendered by agents on the renewal of policies can be better rendered by the carriers themselves."[11] On this basis, he has urged abandonment of commissions on renewals, but the carriers have not taken heed of this modest suggestion.

The following table shows the countrywide expense and acquisition ratios for the comparable casualty lines for 1976.[12]

	Total Underwriting Expense Ratios		Acquisition Costs Ratios	
	Stock Comp.	Mutual Comp.	Stock Comp.	Mutual Comp.
Group Accident & Health	17.5	13.8	9.4	4.7
Workers' Compensation	27.3	22.2	9.3	4.8

This gap between overhead costs in workers' compensation and group accident and health insurance becomes even more glaring when we compare the operating cost ratios of various health insurance plans with New York Workers' Compensation. Data contained in the study entitled "Private Health Insurance in 1974: A review of Coverage, Enrollment, and Financial Expenses" shows the following startling differences in 1974.[13]

Type of Carrier or Plan	Benefits as Percent of Premium	Operating Costs as Percent of Premium
All Plans (excluding Workers' Compensation)	87.2	14.1
Blue Cross	95.1	5.4
Blue Shield	89.5	11.8
Group Insurance	90.6	13.-
Individual Insurance	46.3	47.-
Community Plans	94.2	6.7
Employer-Employee-Union	95.1	7.-
Private Group Clinics	79.3	15.-
Stock Companies (Workers' Compensation)[12]	54.34	45.66
Mutual Companies (Workers' Compensation)[12]	63.23	36.77
State Insurance Fund	65.25	34.75

There are, of course, some differences between the new programs and the old workers' compensation pattern. But even after allowances are made for insurance differentials in the benefit structure and duration, the cost spread is too great to be justified on those grounds. There can hardly be found an explanation for the bizarreness of an insurance rating system that permits the carriers to allocate about 100% more of the premium dollar for overhead costs in workers' compensation than in group accident and health insurance; or allows charging 17.5¢ of every premium dollar for commissions and brokerage fees in workers' compensation, while under countrywide group and health insurance, commissions, brokerage and other acquisition costs amount to 9.4% for stock companies and 4.7% for mutual companies.

d) The 2.5 Percent Allowance for Safety

The 2.5 cents of premium dollar allegedly earmarked for accident prevention and safety is another mystery of the rate-making process and its expense loading component. The so-called Regulation 30, issued by the New York Insurance Department, contains instructions for "Uniform Classifications of Expenses." It specifically recognizes "costs of inspection, engineering, and accident and loss prevention" as part of permissible expense loading. Consequently 2.5 or 2 percent for safety has always constituted an inseparable element of the premium dollar.

However, as pointed out in the Gellhorn-Lauer penetrating study on the administration of the New York Workmen's Compensation Law, there is no agency charged with supervision of how the carriers spend this money or even whether it is spent on safety at all.[14] Neither the aforementioned Regulation 30 nor the Uniform Accounting Instructions contains a definition of the "expenses for safety and maintenance of rating bureaus" or what part of this item should actually be spent for safety in the strict sense of the word. The result of this perplexing vagueness is that "nobody supervises the carriers to make sure they spend this money wisely or, indeed spend it at all for the specified purposes." What we actually have here is a misnomer designed to disguise another loophole in the rate-making structure.

To be sure, some of the larger carriers undoubtedly do accomplish reliable results in this field, but serious gaps in performance are apparent. About half of New York's workers are employed in establishments having fewer than one hundred employees. These establishments account for two-thirds of the disabling injuries suffered in this state, a markedly disproportionate share. While the smaller employers pay insurance premiums containing the 2.5 percent allowance for safety work, they seemingly receive nothing in return because the carrier's efforts are concentrated upon the larger establishments. The OSHA and, to some extent, the State Labor

Department spend a substantial sum each year for educational work among small employers and enforcement of factory safety regulations, but the private carriers turn their attention elsewhere towards profit.

The Gellhorn-Lauer study contains a most interesting quotation on this issue:

> "To denounce all insurers because some are derelict is as senseless as denouncing all officials because some are corrupt. No such generalized denunciation is now intended. Worthy of being reported, nevertheless, is the opinion of a highly placed officer of the state government concerning the inadequacy of safety prevention efforts in New York. He asserts that the efforts lag because if they were pressed, accidents would diminish in frequency, compensation payments would decline accordingly, premiums would be reduced as a consequence, profits would fall as premium income became smaller, and the insurance companies' bureaucratic structures would be shaken by personnel reductions as the workload grew lighter.
>
> "Whether or not this jaundiced view of insurers' motives be sound, some change, in the present situation seems clearly needed. The existing premium allowance should be eliminated or the expenditure of the collected moneys should be supervised or the Board itself should undertake the responsibility now entrusted to others. In any event accident prevention, especially in the smaller plants, is a central element of the problem of industrial disability for which workmen's compensation is only a palliative."[14]

e) Classifications and Manual Rates

The premium for a policy is based on the type of business and class of risk to which that business has been assigned. There are more than 700 classifications used in New York, but very little is known about them since they are created, revised and applied by the carriers without any supervision by a government agency.

The secrecy surrounding the classifications and their proliferation, despite automation and technological changes tending to diminish the risk of some occupations, lead us to the assumption that the insurance companies base their classification procedure not on reliable statistics pertaining to the individual business but on subjective judgment fraught with arbitrariness and inaccuracy. The result is that most premiums, in the final analysis, amount to unsubstantiated guesses of the individual carrier.

Such fragile classification system produces a base rate figure referred to as a Manual Rate that is subject to the supervision and approval by the Insurance Department. But the Manual Rate is merely the starting point in determining the cost of an employer's insurance. For risks whose average annual premium calculated at manual rates exceeds $750 over a period of two or more years or whose premium during the past year exceeds $1,500, a mandatory experience rating is in effect. Thus, although 90 percent of the employers pay manual rates, manual premiums account for only 10 percent of the premiums collected, with the remainder of the premiums subject to experience rating.[15]

Thus, published workers' compensation manual insurance rates are available only for manual rated risks which amount to only about 10% of the total compensation premium. In respect to the vast majority of compensation premiums, statistically valuable rates are not available and the line is essentially unregulated in fact, if not in theory. Thus, for workers' compensation insurance, except for the approximately 10% manual rated businesses, it really does not matter whether our state is a "prior approval" state, or whether it is an "open competition" or "file and use" state.

f) Interstate Cost Variations

The large cost differentials among states and variations in adjusted state manual rates is another puzzle of the rate-making process in workers' compensation. Admitting that ascertaining the ratio of earned premium to payroll for each state is rather a raw method of making precise interstate comparisons of employers' costs of workers' compensation, they are, nevertheless, shedding some light on the mysterious way in which these rates are put into effect. Recent figures from the National Council on Compensation Insurance contained in a still unpublished study by Prof. John F. Burton, Jr. shows the compensation average earned rates by state as ratio of standard earned premium to the total payroll.[16] (See table 1 on page 40)

With an allowance granted for some factors contributing to these interstate difference, such as different benefit levels, administration, wage levels, payroll limitations and so on, there is still no explanation why Connecticut, with a higher maximum benefit rate ($147 - $221 as of January 1, 1978), has a lower average earned rate (1.11) than New York's 1.19; or why Arizona, with a $154 maximum, has an average rate of 2.47 or more than double of the New York rate; or Iowa with its $247 maximum has an average earned rate of 0.83.

We do not have an explanation for these discriminatory variations, but studies conducted by authorities in this area, such as Prof. Burton[16] or Prof. Herman M. and Anne R. Somers,[17] clearly indicate that:

compensation insurance costs have not been a significant element in industry location; and

the contention of the employers that interstate cost variations are due to differences in benefits is absolutely erroneous and without any foundation.

III. Failure to account in the rate making procedure for income from Investment and Unutilized Reserves

Workers' compensation is not a private business and must not be a shelter for an unbridled pursuit of profits. Insurance carriers have apparently not demonstrated their ability to adjust themselves to the burdens imposed by the social purposes and compulsory nature of the compensation program when they permit profits to rise far above what is usual in other related casualty insurance systems.

There is presently being allowed in the determination of the manual rate a so-called profit factor of 2.5% of net premiums. This allowance, however, is totally unrealistic because it fails to consider profits from underwriting, hidden profits, profits from investments and from other different sorts of disguises that eventually wind up as profits.

Statistics submitted by the New York Compensation Rating Board at the hearing on September 28, 1978, purporting to point out an underwriting loss in the amount of more than $263 million for calendar years 1973 - 1977, show little compunction when it comes to suppressing facts. The facts are that in computation of these "losses", totally misleading figures have been used with no relationship to fact.

a) They are based not on direct premiums written, but on earned premiums; that is, a pro rata portion of the premiums applicable to the expired period of the policy. For instance, direct premiums written in New York in 1976 (the last year for which these figures are available), amount to $675,166,797, which is by some $167 million dollars higher than the earned premiums for that year.[18] Yet it is questionable to what extent, if any, this $167 million put aside as the unearned premium reserve has ever been calculated in the computation of the underwriting results.

b) Another generous source for latent income to carriers, not directly reflected in the immediate underwriting experience, is the long run difference between "losses incurred" and "losses paid". Of course, theoretically this quantity expresses the reserve that must be set aside for the making of subsequent payments on accrued liabilities plus undistributed profits. But practically a conservative estimate of incurred losses turns as a rule into a hidden source of revenue for the carriers.

From statistics submitted by the State Insurance Rating Board, it would appear that the workers' compensation insurance line as a whole had poor calendar years for 1973 - 1977. But the underwriting losses in the amount of more than $263 million are not to be taken too seriously. First, because workers' compensation insurance has always been a favored wedge or business-getter for more profitable lines and second, because compensation reserves always provided substantial funds for investment at large and often phenomenal premium rates. Since insurance carriers usually do not separate their investment earnings by line of insurance, it is virtually impossible to determine the return realized on workers' compensation premiums alone. But it is difficult to accept the lament about underwriting deficits when we realize that in 1976 alone (the last year for which these figures are available), the life and accident and health companies, of which the workers' compensation insurance is an integral part, shows a net income of $1,918,118,152, unrealized capital gains of $3,180,644,354, dividends to stockholders of $786,438,656 and an increase in surplus to policy holders of $4,312,323,850.[19]

Furthermore, the other complaint of the Rating Board that the permissible loss ratio for the years 1973 - 1977 was underestimated and that "actual" loss ratio exceeded the permissible one must also not be taken too seriously. The Rating Board, for instance, conceals the fact that the loss ratio, especially in the years before 1973, was favorable to the carriers and that the difference between permissible and actual losses alone permitted the carriers to collect excess premiums to the tune of hundreds of millions of dollars every year.

There is a dire need for a study to determine the true nature of the ratemaking formula with particular attention to the validity of nebulous factors, such as Loss Development Factors, Loss Trend Factors, Underwriting Expenses and Loss Incurred Evaluation Procedures. A Loss Incurred formula which takes actual losses reported in one year and valued at this year's probable cost, and then doubles them for unreported losses, and then triples them for future inflation, must create an extravagant loss and produce hidden profits by overstatement of reserves or the improper expense allocation.

To be frank, little credence can be given to the allegations and reports of the insurance industry. With the special accounting methods disguised to obfuscate the true earning picture and with the rate-making once described in the Stewart "orange report" as "being unique and inscrutable",[20] it is conceivable that, in petitioning the department for rate increases, the insurance industry could invariably report it is losing money and at the same time consistently assure stockholders that it is making considerable profits.

Hearings before the United States Senate Anti-Trust subcommittee reveal that in the years 1958 - 1967, stockholder-owned property and casulaty companies showed an underwriting loss of over $731 million, but by using special accounting methods this loss turned into a $413 million profit.

In 1967 alone, the 10 largest stock property and casualty companies reported an underwriting loss of $273 million based on statutory methods of accounting, but this loss, when adjusted to "generally accepted accounting methods", turned into a profit of $55 million with neither figure including the very substantial net income on investments estimated by the 1967 Congressional report at $1.7 billion.[21]

And a page one lead article in the Wall Stree Journal a few years ago entitled "Bulging with Cash, Insurers Channel Chunk of Big Operating Gains Into Untaxed Reserves" begins with the following startling statement:

> "Three years ago, we were looking under rocks for pennies and now we've run out of places to hide the profits."
>
> "Last year" according to the same article "was a very good year for the nation's fire and accident insurers. But their earnings statements, as healthy as they looked, only partly showed it. Many of the largest insurers took advantage of a fat 1971 to stash millions of dollars into untaxed reserves against potential losses. This amounted to perhaps the greatest injection of new cash in

the entire history of the insurance industry."22 (emphasis added)

And to quote some most recent sources, we refer to an article from Barron's of June 5, 1978 in which James W. Harding, President of Kemper Corporation, predicted that his company's investment income would increase by almost 100 percent in five years, and by over 350 percent in ten. What is especially noteworthy is that regardless of "whether Kemper shows underwriting gains or losses (within limits), or breaks even, investment income probably will grow at about the same rate."

> "For most insurers, interest, dividends and rents some time ago displaced underwriting as principal determinants of net income. Which is quite a change from the traditional role of this type of earnings -- to smooth out the wrinkles in operating results created by underwriting ups and downs. But today, investment income bulks so large that it can, as it did in 1977, turn a year of modest underwriting gains (the industry's combined ratio stood no exception) the book value of other firms has shot up as well. Aetna's shareholder equity last year rose by 17 percent, Kemper's by 25 percent, Mission's by 26 percent, Progressive's by 22 percent and St. Paul's by 23 percent. This year's gains will very likely be smaller, but they will still be first rate, even if underwriting experience worsens.
>
> Still, the gains ahead loom large enough to suggest that the investment income of many an organization will double after four or five years. Some may do so in three. They will make such progress even in the face of occasional modest underwriting losses, such as many observers foresee in the next year or two."

When we further consider that, according to the New York State Insurance Department's 1975 Annual Report, the fire and casualty companies, of which workers' compensation is a part, have shown stupendous growth during the 1965 - 1975 years. They increased their aggregate net premiums from $12.32 billion in 1965 to $30.59 billion in 1975 or by 148%; admitted assets from $28.95 billion in 1965 to $57.27 billion in 1975 or by 107%; and premium and loss reserves from $14.57 billion in 1965 to $39.67 billion in 1975 or by 177%.

In 1976 alone, the "bad" year that, according to the Rating Board, generated an underwriting loss of $69,269,241, the "poor" casualty and fire companies reaped a total investment income in the amount of $4.083 billion and a total income from all sources in the amount of $55.578 billion. At the same time, the net reserves for unpaid losses in workers' compensation increased from $5.294 billion in 1973 to $8.765 billion in 1976, or by 66%.[23]

Under these conditions, when someone like the Insurance Rating Board turns one pocket inside out to show how empty it is but has hundreds of billions of dollars in the other pocket, it is difficult to take his claim too seriously.

Furthermore, with the interest and dividends displacing underwriting as principal determinants of net income, there is good reason to doubt whether the property-liability insurance industry needs or wants to make a profit on underwriting.

But the insurance industry is most interested in concealing investment earnings and in keeping them apart from the rate-making method. It is this aspect that is the crux of the whole problem.

The Insurance Department's report of November 21, 1972 contains an admission that "measures of insurance company profitability should include all income from whatever source derived."

The Department's regulation No. 70 implements this principle in relation to property-liability insurance, nevertheless, it is debatable whether New York's rate-making system, which should include all realized investment income in its profit calculations, has even scratched the surface in controlling excessive profit-making.

The inscrutability of the rate-making process, accompanied by the ineffectiveness of state regulations makes the measuring of underwriting and investment profits very difficult, if not entirely impossible.

For example, in 1976 the reported total investment income of fire and casualty companies amounted to $4.08 billion, or a handsome 8.4% of the $48.24 billion net premium earned in that year.

Thus, 8.4% of the net reserves for unapid losses in workers' compensation, amounting to $8.76 billion, must have generated a profit of more than $723 million. It can safely be assumed that only a miniscule part of this amount, if any, was ever considered in the determination of the premium rate or subject to taxes.

Section 176 of the Insurance Law, in effect since 1969, stipulates that "rates shall not be excessive, inadequate, unfairly discriminatory, destructive of competition or detrimental to the solvency of insurers" and mandates that "in determining whether rates comply with the foregoing standards, the superintendent shall continue to consider insurers' earnings on investments of appropriate reserves".

This provision has very little, if any, practical effect and has been, from the viewpoint of the consumer, rather meaningless for the following reasons:

a) The law does not contain a definition of what makes a rate "excessive, inadequate or unfairly discriminatory" Neither does Sec. 183 (1) (d) strictly define the term "reasonable profit" as a basis for rate determination.

b) Income from investments and unutilized reserves was hardly included, either before or after the enactment of the 1969 law, in the determination of the insurance rates. Thus Section 176 of the Insurance Law, which stipulates continuation of consideration of insurers' earnings on investments, enables the Superintendent of Insurance to continue the prior procedure under which investment profits were never directly considered in the rate determination. The contention of the Insurance Department that investment profit is indirectly considered in rate-making through a lower underwriting profit rate does not hold water, since it is based on a fictitious assumption of the profit rate. There are no data or statistics proving the extent to which the underwriting profit factor would be higher or lower depending on the investment profit.

c) The intentionally confusing bookkeeping procedures peculiar to the insurance industry essentially differ from generally accepted accounting principles and enable an insurance company to legally show both a profit and a loss depending upon whether it addresses itself to its stockholders or to the tax revenue office. The illogical and ludicrous charade of splitting the premiums into earned and unearned premiums is, by itself, a very effective method of obfuscating the true earning picture.

d) There is no accepted or standard method for handling loss reserves. Consequently, the creation of loss reserves remains subject to individual company judgment and varying practices, which often differ sharply among companies and inject an imprecise and unsound element into rate-making. Many companies, by over-estimating their losses, reflect an unrealistic picture, thus turning what otherwise might be a profit into a statutory underwriting loss. This is a method described in a court decision (Aetna Insurance Co. vs. Hyde S.W. 65, 1926) as "supported by the weight of expert skill in managing statistics, skill in summoning phantoms, and in making realities vanish".

e) The multiline structure of most large insurance companies presents a formidable problem which has received little attention. The diversification of the insurance line within one company lessens the contribution made by a given line to a company's overall earnings and makes the establishment of the relationship between premiums and earnings more difficult. The problem of allocating loading expenses among different lines opens another avenue for mischief and abuse, since the expense rate for the company as a whole bears little or no relationship to expenses of any of its insurance lines.

IV. Excessive litigiousness of the carriers

The statement of the Insurance Rating Board of September 28 contains the following argument:

> "As legislated maximum benefits approach the average salary in New York State and elsewhere, it becomes increasingly attractive for claimants to seek workers' compensation benefits. The increased benefits and liberalized administrative practices together with supplemental sources of income such as Social Security and union benefits may well have lessened the injured employee's incentive to work".

We consider this allegation utterly baseless and only designed to divert attention from the true reasons of "deterioration" of loss experience.

It is true that the loss escalation reflect an expansion of the compensation benefit system. However, the Workers' Compensation Cases Closed statistics for 1951 - 1977 (contained in table 2 on page 41) shows that the number of cases closed and classified by the extent of disability were rather stabilized in those 26 years and even show some decline in all areas despite the fact that the coverage under workers' compensation increased from 4,800,000 in 1951 to about 6 million in 1976 or by 25%.

Furthermore, an analysis of direct premiums and direct losses in workers' compensation for the years 1961 - 1976 clearly shows the fallacy of the carriers' contention about the attitude of the claimants. (See table 3 on page 42) It shows that during those years the direct premiums written in 1976 exceeded the premiums in 1961 by 171%, while the direct losses kept pace more or less with the increase of premiums. But the ration of direct losses to direct premiums also remained stable at the level of 57.9% in 1961 and 1976 with some slight fluctuation in the years between.

Thus, with the number of workers' compensation cases declining and with the loss factor actually unchanged during the period of some 16 years the lack of any relation between the behavior of the claimants and actual aggregate claim cost becomes evident. The benefits increased in this period of time not because of the increased number of claimants or increased injury frequency and severity rates -- these cost components actually declined -- but because they have been grossly inadequate and their improvement has become imperative to keep them abreast with the rising wages and cost of living.

The charge brought by the Rating Board that higher benefits encourage claimants to seek workers' compensation benefits only shows that the insurance industry has never really-accepted workers' compensation as an assured right of the injured worker and still considers it something to be fought against at every turn in order to minimize disbursements to claimants. Thus, every loophole in the law and every trick in the administrative procedure has been used by the carriers to achieve this goal. As has been stated years ago in various studies of New York's workers' compensation system, carriers and employers controvert claims first, then investigate to see whether their denials of liability are meritorious. There is ample evidence that many appeals have been made by carriers and employers not always in good faith but evidently for purposes of delay and bargaining. A vicious administrative circle is thus erected. The litigious atmosphere causes delay in settling claims, and delay is itself a provocative cause of more litigation.

This tendency to promote unwarranted litigation and thereby increase the overhead of the system and saddle the injured worker with unjustified expenses goes straight to the heart of an appraisal of our workers' compensation system and to the comparison of the adjustment expenses of the private carriers with those of an exclusive state fund.

V. For an Exclusive State Insurance Fund

Over the years, the single, insistent argument of employers resisting liberalization of workers' compensation has been the cost. Of course, the basic cost of any social program is a relevant factor. Unfortunately, employers and state governments have never seriously examined the great potential at hand to make enormous sums of money available for benefits without additional employer financial input.

We are not talking in a vacuum and refer to a well known mechanism: an exclusive state fund. In 1976, the last year for which figures are available, the employers paid $675,166,797 in direct premiums. $284,450,136 or 43% of this remained with the insurance companies as "expense loading", "retention ratio" or "administrative expenses". In a nutshell, only 57¢ of every premium dollar found its way into insured worker benefits -- cash benefits and medical care.

In 1970, the direct premiums amounted to $465,590,438 of which only 51% was channelled into workers' benefits.

Now compare the figures on administrative costs of 1970 with that of exclusive state workers' compensation funds in the same year:

	1962-1966	1970
Nevada	0.12	0.11
North Dakota	0.09	0.08
Ohio	0.04	0.04
Washington	0.11	0.14
West Virginia	0.05	0.04
Wyoming	0.10	0.07

Pertinent also are figures on benefits and administrative expenditures of the federal Workers' Compensation program for public employees. In 1977, the federal government spent $544,687,000 for cash and medical benefits to injured workers, while the administrative expenditures amounted to $23,494,000 or 4.3 percent.

In New York, private insurance expenses in 1970 amounted to 49¢ of each premium dollar. But the exclusive state fund expenses in both Ohio and West Virginia amounted to 4¢ of each premium dollar, in Wyoming to 7¢, North Dakota to 8¢, Nevada to 11¢ and Ohio to 14¢.

The State of Washington, which has an exclusive state workers' compensation fund, reported for the year 1970:

> "For every $100 collected in premiums, the Department paid out approximately $102.50 in benefits to workers".
>
> This, of course, was made possible by lower expenses: the state is not interested in making profits, or expending large sums for lobbying, or contributing precious premium dollars to acquire new business. In addition, the state places its funds, both current and reserves in income-bearing investments which return the increments therefrom to workers in the form of benefits.
>
> In another exclusive state workmen's compensation fund, West Virginia, the June 20, 1973 annual report and financial statement of the West Virginia Workmen's Compensation Fund relates:
>
> "From its organization in 1913 to the present the Fund has paid benefits totaling $531,595,394.90. When the reserve for outstanding claims is added to this amount, the total is $687,976,606.90. This is $75,231,865.32 more than the total premiums received by the Fund and reflects the fact that for every dollar employees have paid in premiums to the Fund, the Fund has paid, or will pay, to disabled employees and dependents, one dollar, twelve and three-tenths cents."[24]

"It appears that benefits to the injured and survivors could be increased from one-third to one-half without increasing the costs to employers, if operating expenses could be kept to 25 percent of total costs", say the Somerses in their book on workers' compensation. According to this formula, about $115 million could be used for improvement of benefits in 1976 alone without any increase in premiums. And this saving could be further increased to $236 million if private insurance carriers would be eliminated from workers' compensation and the operating cost of an exclusive state fund reduced to 5% of the premium. Such a step would not only serve workers best, but in the long run it would redound to the benefit and credit of business and industry as well as the total community.

We believe that these startling figures alone make the case clear that the state has seriously neglected its responsibilities to both workers and employers by pursuing a socially negative and wasteful policy of giving away the basic administration of workers' compensation to private insurance companies. The history of the workers' compensation law and these statistical facts have jointly proved this approach as not only wrong but deeply harmful to injured workers and a cause of losses to employers.

The universal hue and cry by employers against the modernization and humanization of workers' compensation laws is -- cost. Almost uniformly, employers argue that proper liberalization of compensation will mean unbearable additional strains on production costs. The exclusive state fund is the manifest answer to this complaint. There could be an overnight drastic upward revision of compensation levels without serious additional strain upon employers merely by the expedient establishment of an exclusive state fund program.

Of course, the great savings achieved by an exclusive state fund should, in the main, be turned into higher weekly compensation, better medical care, more adequate provision for widows and dependents. In short, the saving of money to the employer is not an end in itself. The efficiency, the elimination of waste, insurance company profits, and so on which result in extraordinary monetary savings must be turned into channels of assistance to the injured worker.

VI. Conclusions and Recommendations:

We believe that the present State administration and the present administrators of the Insurance Department and the Workers' Compensation Board deserve a chance to implement all the objectives stipulated in Article VII-A of the Insurance Law to the extent that the cost of insurance be kept within the reach of the average person's pocket, that the law be written and administered by and for the benefit of the workers and not the insurance industry and that loopholes in the regulatory net be closed so as not to allow insurers to evade effective scrutiny.

We therefore take the liberty to submit for your favorable consideration the following recommendations:

1) Recommend to the Governor that an independent, competent, objective and continuing Council of Workers' Compensation Financing be appointed to undertake a comprehensive study and evaluation of the Workers' Compensation Law in order to determine if such law provides an adequate system of compensation benefits and a reasonable economic financing structure.

2) Recommend to the Legislature to memorialize Congress to repeal the McCarran-Ferguson Act and make the prohibition of anti-trust provisions of the Sherman Act applicable to price fixing and other rate-making agreements among insurance companies.

3) Recommend to the Governor and the Legislature establishment of an exclusive state insurance fund that will not only serve workers best, but in the long run redound to the benefit and credit of business and industry as well as the total community.

4) The Superintendent should have the affirmative duty of prior approval or disapproval of rates and setting the effective date of any rate change. In order to strengthen examination processes and meet increased work loads, the budget and the staff of the Insurance Department should be adequately increased to make effective supervision of the 494 property and liability insurance companies, and examination of the tens of thousands of rate filings, classifications, schedules, and manual rates and so on, possible. The present cost of the rate regulatory process represents only about 8.5 percent of the total budget of the Department. This hopelessly inadequate funding is responsible for the fact that the Department becomes occupied more with forms than with substance and in charge of a rate regulation system that, in the words of the Stewart 1969 "Orange Report" has turned into a "ritualistic processing of paper".

5) An effective mechanism must be developed within the Insurance Department to prevent some elements in workers' compensation insurance from perpetuating most of the monopolistic control over the rate-making process. The following action should be taken: terminate the archaic instructions for expense-classifications that permit defraying from the premium dollar such totally unrelated expenses as "cost of favors and presents given or extended to others than employees", entertainment of guests, cost of souvenirs "not generally distributed", dues and subscriptions to social or civic clubs and so on; substantially reduce the 17.5 percent acquisition costs that are 3 or 4 times

higher than the entire cost of an exclusive state administration and do little if at all toward improving the quality of the insurance service; terminate the present bizarre reserve structure that makes possible hundreds of millions of dollars going into vast reserve funds completely unregulated as to investment and more important, not considered as to amount, or income or profit with relation to underwriting losses. If ever a case was made for an inquiry and total overhaul of the present system, the reserve funds alone would be a sufficient basis.

6) Total income from investment of the unearned premiums reserve and the loss reserve should be included as part of the rate-making formula. There is no reason whatsoever why the employer should be hoodwinked by a system of incurred losses and unearned premiums under which the policyholder is given no credit on the money received from investment of at least 65% of the premiums paid.

7) The present bookkeeping method should be replaced by a uniform system that would make strict control over accounting possible. Under such a system, total premiums should be regarded as receipts, which, together with other receipts, constitute the income for the period under consideration. From the amount of such income should be deducted actual losses and expenses, the difference representing gains or profits. There is no reason for continuation of the present methods of bookkeeping which, subject to individual company judgment and varying practices, treats losses and expenses as being substantially more than the amount necessary to pay them and disregards an overwhelming part of

unearned premiums without any showing of the amount, if any, of expenses and losses actually paid therefrom.

8) Social fairness demands a rate structure based on a classification and system reduced to a bare minimum throughout the state in such a way as to avoid arbitrariness and make a strict and supervised structure of the classification system possible.

9) To help assure that state, federal authorities, labor and industry are adequately informed of the financial operations of the insurance carriers, full and complete disclosure must be required of all financial operations of the carriers separately by insurance lines.

10) Establish accurate, precise and clear definitions of the terminology now used in the reports of the department and carriers to make them readable and understandable to the average reader.

11) Incorporate into the law standards for rate-making, clear-cut definitions of the profit formula, including all earnings on investment, and unrealized capital gains. This determining of profitability by a fixed rate must be set by law and not left to administrative regulation.

The time is ripe indeed to take a hard, close look at the operations and the role played by the insurance industry in the workers' compensation system. There is a dire need for a thorough and comprehensive re-examination of the whole compensation financing system. We can neither assume nor concede that a social insurance system such as this one must be conducted for profits by the insurance carriers. A look at the structure of the 6 existing exclusive state funds or at the Federal Employees' Compensation Program with its total administrative costs of less than 25¢ per $100 payroll or less than one cent per hour of work for every covered worker, clearly and loudly points to a great reservoir at hand that could make enormous sums of money automatically available for benefits in addition to tremendous savings to employers. Thus we can legitimately tell all those who hurl the beguiling phrase of "costs driving business out of the state", while at the same time close their eyes and ears to the tremendous waste in financing this program, that this position is nothing but sheer deceit and hypocrisy.

It is necessary for the carriers to be aware of the fact that the compulsory nature of workers' compensation imposes special public responsibilities on those charged with the conduct of business. The insurance industry, which for years has been pushing for what the traffic will bear, must become fully sensitive to the fact that the needs of the disabled and the principles of workers' compensation must be given higher priority than the convenience of insurance companies. It must also understand that without a comprehensive and radical re-examination and overhaul of the methods of compensation financing, it will price itself out of the social insurance market and make the establishment of an exclusive state fund imperative.

Table 1

Workers' Compensation Experience Countrywide*

Jurisdiction	Policy Period	Payroll	Standard Earned Premium	Average Earned Rate
Alabama	1972-73	$ 4,078,294,781	$ 61,664,627	1.51
Alaska	1971-72	893,143,469	15,213,836	1.70
Arizona	1972-73	3,576,136,791	88,483,241	2.47
Arkansas	1972-73	1,792,418,217	40,304,611	2.25
California	1972	46,434,710,723	817,409,800	1.76
Colorado	1971-72	4,765,919,124	47,775,542	1.00
Connecticut	1971-72	6,464,944,558	71,585,695	1.11
Delaware	1972	1,182,167,000	11,463,754	.97
Florida	1971-72	8,433,156,405	211,271,689	2.51
Georgia	1971-72	6,946,688,493	71,566,963	1.03
Hawaii	1972-73	1,134,307,243	23,992,948	2.12
Idaho	1971-72	1,042,619,819	22,070,832	2.12
Illinois	1972-73	18,083,507,728	193,313,501	1.07
Indiana	1972-73	8,201,879,608	62,270,057	.76
Iowa	1971-72	4,363,130,190	36,165,941	.83
Kansas	1971-72	2,836,089,705	33,629,964	1.19
Kentucky	1971-72	4,126,102,100	64,865,961	1.57
Louisiana	1972	3,658,164,990	105,082,289	2.87
Maine	1971-72	1,408,607,444	17,612,510	1.25
Maryland	1971-72	5,876,099,302	83,679,168	1.42
Massachusetts	1971-72	12,524,517,083	198,188,066	1.58
Michigan	1971-72	15,182,112,626	300,991,909	1.98
Minnesota	1972	7,918,451,113	113,406,180	1.43
Mississippi	1971-72	2,360,508,267	41,170,946	1.74
Missouri	1971-72	5,284,495,091	75,066,805	1.42
Montana**	1970-71	400,964,699	7,427,634	1.85
Nebraska	1971-72	2,676,485,267	27,303,233	1.02
New Hampshire	1970-71	1,331,157,045	14,297,659	1.07
New Jersey	1972	17,204,042,500	310,482,159	1.80
New Mexico	1972	808,663,323	13,785,871	1.70
New York	1972	38,776,270,439	461,853,899	1.19
North Carolina	1971-72	8,085,737,753	69,637,572	.86
Oklahoma	1972-73	1,599,123,645	41,234,921	2.58
Oregon	1971-72	4,620,324,741	140,753,933	3.05
Pennsylvania	1972	25,449,660,000	208,273,748	.82
Rhode Island	1972	1,686,594,432	20,245,323	1.20
South Carolina	1971-72	3,207,118,624	37,758,133	1.18
South Dakota	1971-72	781,566,082	8,685,513	1.11
Tennessee	1971-72	5,956,367,730	82,397,258	1.38
Texas	1972	17,616,275,432	353,098,783	2.00
Utah	1971-72	1,656,298,462	12,392,726	.75
Vermont	1972	460,797,523	5,083,118	1.10
Virginia	1972-73	6,822,065,944	57,867,839	.85
Wisconsin	1971-72	7,455,155,489	73,105,801	.98
Dist. of Col.	1972-73	1,709,272,163	17,285,856	1.01
TOTAL		$327,538,037,174	$4,771,217,812	1.46

*Data for all classifications combined. Table prepared by the National Council Compensation Insurance and is based on first reports for the policy periods. The States not included in table do not provide data to the Council. **Private carriers only.

Table 2

YEAR OF CLOSING	NUMBER OF CASES	EXTENT OF DISABILITY			
		DEATH	PERMANENT TOTAL	PERMANENT PARTIAL	TEMPORARY
1951	117,147	771	328	43,611	72,437
1952	126,649	827	274	48,050	77,498
1953	129,783	820	261	48,629	80,073
1954	128,004	910	230	46,317	80,547
1955	121,111	891	245	44,744	75,231
1956	114,447	817	220	46,842	66,568
1957	115,298	767	181	48,918	65,432
1958	118,786	693	194	51,463	66,436
1959	107,048	722	169	43,362	62,795
1960	108,769	704	193	40,404	67,468
1961	95,558	798	160	36,514	58,086
1962	96,372	711	163	34,914	60,584
1963	106,150	807	168	41,938	63,237
1964	107,232	775	193	44,360	61,904
1965	113,196	726	162	46,898	65,410
1966	123,416	789	173	49,698	72,756
1967	123,293	696	154	50,602	71,841
1968	116,025	779	122	47,712	67,412
1969	117,100	793	146	47,045	69,116
1970	118,537	821	103	47,964	69,649
1971	123,124	826	115	49,420	72,763
1972	122,044	754	139	49,550	71,601
1973	117,337	704	156	46,104	70,373
1974	120,539	727	161	48,227	71,424
1975	118,618	704	174	47,886	69,854
1977	110,863	606	136	43,552	66,569

Table 3

	Direct Premiums	Direct Losses		Percent	Administrative Operating Expenditures
1961	$ 249,063,779	$ 144,188,185	or	57.9	$ 104,876,000
1962	254,024,806	158,507,911	or	62.3	95,517,000
1963	254,755,864	161,026,029	or	63.2	93,730,000
1965	267,267,676	173,193,960	or	64.8	94,074,000
1966	312,297,597	185,972,492	or	59.5	126,326,000
1967	355,440,130	194,976,057	or	54.8	160,464,000
1968	382,212,951	207,254,771	or	54.2	174,958,000
1969	415,310,240	231,083,923	or	55.6	184,226,000
1970	465,590,438	239,149,390	or	51.3	226,441,000
1971	510,884,616	265,762,181	or	52.0	245,123,000
1972	483,621,840	280,634,083	or	58.0	202,988,000
1973	512,456,953	298,812,503	or	58.3	213,644,000
1974	551,472,882	324,829,225	or	58.9	226,644,000
1975	587,787,661	354,492,198	or	60.3	233,296,000
1976	675,166,797	390,665,161	or	57.9	284,502,000

Reference Sources

(1) Charles S. Hamilton, Interim Report to Gov. Dewey, Dec. 30, 1954, p.24.

(2) Competition in Property and Liability Insurance in New York; New York State Insurance Department, 1973.

(3) Hamilton's Report to the Governor, December 30, 1954, p.24.

(4) Herman M. Somers and Anne R. Somers, Workmen's Compensation, John Wiley & Sons, Inc., New York, p.269.

(5) Hamilton's Second Report to the Governor, December 29, 1958, p.35.

(6) C. A. Kulp, Casualty Insurance, 3 Edition, p.151.

(7) Workmen's Compensation: The New Jersey Experience, Rutgers University Press, 1960, p.179-180.

(8) 1976 Loss and Expense Ratios, Table 9, New York State Insurance Department.

[illegible]) Arthur H. Reede, Adequacy of Workmen's Compensation, Harvard University Press, 1947, p.300.

[illegible] The Chief Trouble With Workmen's Compensation Insurance, Proceedings of the Casualty Actuarial Society, XXI (1935), p.227-2321

[illegible] Walter F. Dodd, Administration of Workmen's Compensation, New York, Commonworld Fund, 1936, p.593

[illegible] 1976 Loss and Expense Ratios, New York Insurance Department, Table 9.

[illegible] Social Security Bulletin, March 1976.

[illegible] Administration of the New York Workmen's Compensation Law, New York University Law Review, January, April, June 1962 Issues.

[illegible] C. Arthur Williams, Jr., Insurance Arrangements Under Workmen's Compensation, U. S. Department of Labor, Bureau of Labor Standards, Bulletin No. 317, 1969.

(16) Worker's Compensation Costs For Employers: First Draft July 1977.

(17) Herman M. Somers and Anne R. Somers, Workmen's Compensation p.115-116.

(18) Statistical Tables 1976, New York State Insurance Department.

(19) IBIDEM, Table 28.

(20) "The Public Interest Now in Property and Liability Insurance Regulation." New York State Department of Insurance, 1969.

(21) Hearings Before U. S. Senate Subcommittee on Antitrust and Monopoly, Part 13.

(22) Wall Street Journal, June 13, 1972.

(23) Annual Statistical Tables; New York State Insurance Department.

(24) Hearings Before Senate Committee on Labor and Education on National Workers' Compensation Act of 1975, p.355, Statement by Jacob Clayman.

ATTACHMENT 5

THREE-WAY WORKERS' COMPENSATION: LABOR'S POINT OF VIEW

Prepared for the Washington State Legislature
By the Washington State Labor Council, AFL-CIC

2701 First Avenue, Room 300
Seattle, Washington 98121
Telephone: (206) 682-6002

Olympia Office:

330 - 9th & Columbia Building
Olympia, Washington 98501
Telephone: (206) 943-0608

January 20, 1981

opeiu8

THREE-WAY WORKERS' COMPENSATION: LABOR'S POINT OF VIEW

A. Shall We Surrender Our State's Workers' Compensation Program to the Insurance Industry?

B. The Rehabilitation Issue: Three-Way Is No Answer

C. An Established Program, "Head and Shoulders Above Most"

- C-2. $1.05 in Benefits for Each $1.00 in Premium.
- C-3. Labor & Industries Staff Efficiency Improving.
- C-5. Worker's First Check Mailed Within 14 Days.
- C-6. Medical Bill Backlog Cleared Up.
- C-7. Few Department Decisions Are Appealed.
- C-8. How Fraud-Free Can the System Get?
- C-9. Year After Year, the Toll Is Less

D. The Small Employer Needs Our Strong State Fund

- D-2. How the State Fund Can Cut Small Employers' Costs.
- D-4. Heavy Expense Loading in Private Carrier Premium Dollar.
- D-5. Private Carriers Rig Rates to Favor Big Business.
- D-6. Year After Year, the Small Enterprise Gets a Break.
- D-7. A Comparison of Rates in Oregon and Washington.

E. Is Our State Fund Really a "Nightmare," As 3-Way Advocates Say?

- E-2. What About Those "Escalating Costs"?
- E-4. What About Carriers' "Safety Expertise"?
- E-6. Is the State Fund Really "Too Big a Bureaucracy"?
- E-8. What About "Monopoly" Versus "Competition"?

F. A Workers' Compensation Miscellany

- F-2. Oregon System in Trouble, Recent Studies Show.
- F-3. Nevada Better off Without 3-Way, Study Shows.
- F-5. Ohio Manufacturers Association Condemns 3-Way.
- F-6. Private Carriers Soak up Half the Premium Dollar.
- F-7. Private Insurance Ethics in the Hot Texas Sun.
- F-10. The Impact of 3-Way at the Checkout Stand.
- F-11. How Would You Keep a Handle on the System?
- F-12. A Deeper Look at Workers' Compensation Costs.

Selected Readings on Workers' Compensation.

The Real Issue in the Three-Way Controversy:

SHALL WE SURRENDER OUR STATE'S WORKERS' COMPENSATION PROGRAM TO THE INSURANCE INDUSTRY?

Again in 1981, as in so many, many legislative sessions over the past forty years, the proponents of three-way workers' compensation are urging the legislature to surrender control over our workers' compensation program to the insurance industry.

One special interest group, and one only, stands to gain from such a radical restructuring of our long-established system: The 500 general casualty insurance companies licensed to do business in this state.

On each previous occasion, the legislature has weighed thoughtfully, and ultimately in its wisdom has rejected, the arguments advanced by three-way proponents.

This year the legislation -- House Bill 31 -- is being called "the Workers' Recovery Act," although neither workers nor their unions were consulted about so much as a comma in its text.

Its advocates -- an alliance of employer groups calling themselves the "Committee for Better Workers' Compensation," have included in HB 31 proposed changes purporting to address shortcomings in the present system.

Shortcomings there most certainly are. But through all the decades organized labor has lobbied in Olympia, the insurance industry has never shown the slightest interest in addressing them. Except for its almost annual appearance to plead for one or another three-way bill, the insurance lobby has been notably absent from the house and senate labor committee hearings where workers' compensation amendments are hammered out session after session.

As for the other endorsers of HB 31 -- the Association of Washington Business, the State Farm Bureau, the State Food Dealers Association, the State Medical Association, the Contract Loggers Association, the Home Builders Association, the Independent Telephone Association, and the State Retail Council -- not one of them have been distinguished in years past by their zeal in the cause of the injured worker.

We have noted that House Bill 31 proposes changes other than three-way. These may or may not improve the system. During this legislative session, we are prepared to consider each on its merits. But we do not propose to address them here because we cannot believe they are being seriously advanced. They are bait for the gullible. They are external cosmetic touches. They have no organic connection with the real substance of House Bill 31 -- the surrender of our workers' compensation system to the insurance industry.

* * * * * *

Again this year, as so many, many times in the past, three-way advocates are using the shortcomings of the nonprofit State Fund system as a rationale for abandoning it. We of labor have never denied that the State Fund has shortcomings. But legislative oversight and criticism have invariably resulted in administrative improvements which have satisfied the legislature's goals.

A few years ago, three-way proponents were exploiting actuarial deficits in the fund reserves as an argument for their bill. Today the deficits have been made up; the funds have ample reserves; no one questions their soundness.

A few years ago, three-way proponents used the department's failure to make initial time-loss payments within the statutory 14 days as an argument for their bill. Today the State Fund meets the 14-day standard in 93 per cent of its initial time-loss payments. That's better performance than in the "private enterprise" self-insured sector, where only 80 per cent of initial checks are sent out within 14 days.

Not so long ago, three-way proponents cited a massive backlog of unpaid doctor and hospital bills as proof of the inherent inefficiency of a State Fund system. Today that problem has disappeared. Doctor and hospital bills have been paid promptly for the last 23 months running.

As recently as 1979, three-way proponents made much of the costly time lapse between the date a doctor recommended that a worker's claim be closed, and the date the claim was actually closed by the department. Today, that time lapse has been reduced from an average of 77 days to an average of about 20 days -- well on the way toward the department's target of 14 days.

It seems it's any old stick to beat the dog. In 1981, the three-way people have turned to the shortcomings of the rehabilitation program. It is true that the problems in rehabilitation are serious. But they can best be resolved, as other administrative problems have already been resolved, by giving the department the tools and the directives to do the job. Let us remember that for more than a decade, Washington's rehabilitation program -- an integral part of the State Fund system -- ranked first and foremost in the nation. That place of leadership can best be restored within the framework of our progressive existing law.

* * * * * *

With regard to the State Fund system and its shortcomings, labor's consistent position throughout the years was well expressed by William C. Jacobs, then director of the Department of Labor & Industries, in 1970.

"Not a one of us," Mr. Jacobs said then, "would either describe or represent Washington's Workmen's Compensation Law to be a model of perfection.

"This is not to say, however, that it's a bad law. Quite the opposite, it's a good law -- in point of fact, one of the best!

"...When our law is objectively compared with those throughout the rest of the nation, it can be stated without equivocation that Washington's law ranks with the leaders -- it stands head and shoulders above most."

Noting that debates over three way "shed more heat than light," Mr. Jacobs expressed the view that "improving operations and regulations of the present fund should produce more satisfactory returns for a relatively small expenditure of effort."

With that appraisal we in labor agreed in 1970. With that appraisal we agree today.

* * * * * *

We appeal to the legislators to focus on the single crucial question posed by House Bill 31: What would opening our workers' compensation program to private carriers do to the system?

First, House Bill 31 would drive up the premium costs paid by employers and employees. In Washington State, year after year, for every dollar paid in premiums, an injured worker down the road draws at least $1.05 in benefits. Wherever the insurance industry sets the rates, the premium dollar buys no more than about 65 cents worth of benefits, and in some states less than 50 cents worth. In the pages that follow, we present proof of that wide differential from many authoritative sources.

State Fund rates, too, would be driven up under three-way because the fund would be saddled with the heavy acquisition and administrative costs associated with the private carriers. It would be compelled to lobby to protect its share of the market against the insurance industry. Such expenditures waste the substance of a program whose sole object is to help injured workers.

A special class of victims of rising premium costs would be the tens of thousands of small business people of our state. That fact, too, is documented in the pages that follow.

Second, House Bill 31 would build into the system an omnipresent adversary to the injured worker's interests. Our nonprofit State Fund is not under pressure to maintain profit margins or engage in cutthroat competition. It functions not as an adversary but as a trustee, whose responsibility is to evaluate each worker's claim objectively and to implement our industrial insurance law -- a law whose fundamental purpose since 1911 has been to provide "sure and certain relief for workmen, injured in their work, and their families and dependents."

Under the three-way system, the insurance company becomes the worker's adversary. The humanitarian goals of the program are scrapped in the fierce scramble for profits. Insurance companies say they can cut costs. But the major cost in workers' compensation is benefits. The only way insurers can significantly cut costs is to reduce the number of claims. The incentive to obstruct claims is built into three-way. The opportunity to badger claimants is ever present in the unequal, one-on-one confrontation between the helpless injured worker and the professional insurance adjuster.

Third, the pervasive weight of the insurance industry would augur ill for the future statutory rights and protections of injured workers. Down through the years the insurance industry in our state has largely ignored workers' compensation legislation for want of a direct economic interest in it. Enactment of three-way would turn that situation around. The weight of the powerful insurance lobby would be felt against every future proposal to better protect injured workers' interests, and for the kinds of fine-print loopholes and exclusions that pockmark the average insurance policy.

The negative impact of insurance carrier domination on workers' compensation programs can be demonstrated from the record in other states. In 32 states, private insurance companies have a monopoly of the program and a decisive voice in shaping the industrial insurance statutes. The most widely accepted measure of the worth of a workers' compensation program is the body of recommendations adopted unanimously by the prestigious National Commission on State Workmen's Compensation Laws in 1972. Measured against the Commission's standards, how did the 32 private-carrier states fare? A 1975 Washington State Labor Council study showed that in those 32 states the laws

-- were more likely to exclude some groups of workers from coverage;

-- were more likely to withhold injured worker time-loss payments for the first six or more days off the job;

-- were less likely to have statutory authority to oversee the delivery of medical care to injured workers;

-- were more likely to cut off medical care after an arbitrary period, or to limit arbitrarily the dollar amount of medical care;

-- were less likely to have an established rehabilitation agency;

-- were less likely to permit a worker to file an occupational disease claim at any time within one year after the worker learns that the disease may be job-related;

-- were more likely to hold benefits below federal poverty levels for injured workers and for surviving spouses of workers killed on the job.

-- were more likely to limit the duration and the dollar amount of benefits payable to a worker who is temporarily totally disabled; and

-- were more likely to cut off benefits to permanently and totally disabled workers and to survivors of industrial fatalities after an arbitrary dollar amount, or an arbitrary number of weeks, or both.

The State Labor Council study cited 15 yardstick recommendations unanimously agreed to by the Commission. Washington's program met all 15 standards. None of the 32 private insurance states did as well.

A copy of the State Labor Council study will be sent to any legislator upon request.

THE REHAB ISSUE: THREE-WAY IS NO ANSWER

Three-way advocates are making much of the problems of our state's rehabilitation program. They single out rehabilitation as an issue eight times in a single brochure. The heart of their position is the unsubstantiated claim that "a private insurance carrier would respond faster to the rehabilitation needs of an injured worker."

Skepticism as to the compassion of the insurance industry aside, experts in the field agree that timely referral is crucial to effective rehabilitation and successful re-employment. But industrial insurance claims management people have been delaying an average of 15 months before referring workers to rehab. The results have been a severe deterioration in the program. Until very recently the backlog of workers urgently in need of rehabilitation has been huge and growing. At the same time the facilities of the H. T. Buckner Center have been woefully underutilized. Once admitted to the program, workers often have become so demoralized that it has taken much longer to restore them to vocational fitness. The "return-to-work" rate has inevitably declined. In some cases the worker who with timely help could have been returned to productive labor has ended as a welfare recipient instead.

Prodded by criticism from legislators and others, the department is moving to improve the situation. Much of its recent "Comprehensive Plan for the Industrial Insurance Division" is addressed to the re-establishment of an effective rehabilitation program. In addition, legislation addressing the issue will be considered at this session. Just as the department has responded to criticism on other administrative backlogs and bottlenecks, so it can be induced to respond in this difficult situation.

Already changes are in process. In a single year, the Buckner Center has shifted its emphasis from physical care services to a broad array of vocational and psychological services whose purpose is to overcome emotional and other obstacles that keep the medically restored worker from returning to the job.

Available services now include those of 32 professional counsellors located throughout the state to help workers find solutions to their re-employment problems. At the Buckner Center itself, recovered workers can get specialized guidance in exploring job alternatives; in readying themselves physically and psychologically for the return to work; in dealing with emotional and personal problems associated with their injuries; in developing realistic re-employment plans tailored to their particular needs; and in building the endurance, dexterity and other physical qualities that will enable them to face once again the rigors of daily productive work.

A new public information program is already acquainting workers, employers, doctors and the community at large with the new and broader range of vocational services at Buckner and in field offices throughout the state. And the department is implementing a new monitoring system to speed referrals; its target is referral no later than 120 days after the date of injury.

Injured workers are first of all troubled men and women. At the heart of effective rehabilitation is a compassionate concern with the worker's wellbeing, dignity and self-respect. Whatever its limitations, Buckner's commitment to and compassion for injured workers cannot be duplicated anywhere in the profit-oriented private sector.

Within the framework of the nonprofit State Fund, the Buckner Center was for well over a decade a "state of the art" model for the nation. There is no reason to believe it cannot once again become pre-eminent.

In 1972, the objective study by the National Commission on State Workmen's Compensation Laws found serious fault with rehabilitation programs generally. Since private carriers dominate the program in most states, the Commission's findings may fairly be viewed as an indictment of their typical rehabilitation practice. In any given state, private carrier rehabilitation staff and resources may range from good to non-existent.

To raise the standards in this vital area, the Commission unanimously recommended that each state "establish a medical rehabilitation division, with authority to effectively supervise medical care and rehabilitation services." Our state agency, of course, has all along had such authority. But in twenty states where the private carriers monopolize the system and shape the workers' compensation laws, no such rehabilitation agency exists. Each insurance company is free to make its own rules, to provide or not provide rehabilitation services, of good quality or poor, unmonitored and unaccountable.

AN ESTABLISHED PROGRAM 'HEAD AND SHOULDERS ABOVE MOST...'

With the rights and benefits of more than 2.5 million working men and women on the line, surely it's wise to think twice before ditching an established workers' compensation program for something radically different and controversial.

That's the way William C. Jacobs seemed to feel in 1970, when he termed our program "one of the best....head and shoulders above most."

We still feel that way. Here are some of the reasons why.

$1.05 IN BENEFITS FOR EACH $1.00 IN PREMIUM

Consistently, year after year, for every dollar paid in premium in Washington State, an injured worker down the road draws at least $1.05 in benefits. That's possible because investment earnings more than offset the entire expense of administering the program.

The Department of Labor and Industries spends about seven cents of each premium dollar for all administrative costs, including occupational health and safety, the rehabilitation program, and the cost of appeals. In FY 1978, State Fund investments earned about 11 cents, in FY 1979, about 16 cents and in FY 1980, about 24 cents for each dollar of premium paid. Every bit of investment income is plowed back into the program. This income enables the Department to discount premium rates substantially in advance.

No private insurance carrier, and no private insurance state, will ever deliver that kind of performance.

Of each premium dollar, only 79.5 cents comes from employers. The remaining 20.5 cents is deducted from workers' paychecks. Workers' contributions finance half the medical aid fund and half the supplemental pension fund.

Employers paid $315 million and workers paid $81 million in premium to the nonprofit State Fund in FY 1980.

LABOR & INDUSTRIES STAFF EFFICIENCY IMPROVING

When it comes to equity for injured workers, labor has often clashed with the department over its policies, practices and priorities. We expect to go right on exerting pressure of that kind to assure that our basically sound law is implemented the way it ought to be.

But we have never engaged in the kind of sweeping and irresponsible denunciation of the department that seems to be the stock in trade of the three-way advocates. Take, for example, these phrases from their current brochure: "Delay and inefficiency in claim processing...the department is buried under a mountain of paperwork..."

Any agency big enough to process 185,000 State Fund claims and handle $396 million in premium income in a single year is going to make errors and draw criticism. But in fairness, the criticism ought to be tempered by recognition of the department's continuing improvement in overall efficiency.

Over the past seven years the number of claims processed per staff year in the department's industrial insurance division has risen steadily as the table on the next page shows.

Fiscal Year	State Fund Claims	Claims Section Staff Years	State Fund Claims per Claims Staff Year
1973	141,509	388.0	364.7
1974	148,503	379.2	391.6
1975	151,388	395.3	383.0
1976	155,154	398.5	389.4
1977	165,570	394.7	419.5
1978	176,541	393.0	449.2
1979	186,888	380.0	491.8
1980	184,768	414.4	445.8

Between Fiscal Year 1973 and Fiscal Year 1980 the number of State Fund claims rose 30.6 per cent, but the number of staff years in the claims section rose only 6.7 per cent.

Thus the number of State Fund claims processed per claims section staff year rose a substantial 20.3 per cent.

Note the increase in staff between 1979 and 1980. This is primarily due to the addition of personnel authorized in the 1979-81 biennial budget to implement the department's "claims cost reduction plan." This plan was designed to cut program costs by reducing the time lapse between the date a doctor indicates a claim closure would be appropriate and the date the department actually closes the claim. Prior to implementing the plan, the time lapse was averaging about 77 days. The department had been rightly criticized for this intolerable and costly delay. But by January, 1981, some 55 days had been shaved from the average time lapse, saving nearly two months in time-loss payments (about $1,300) per affected claimant.

WORKER'S FIRST CHECK MAILED WITHIN 14 DAYS

RCW 51.32.210 requires that initial benefit checks be mailed to eligible injured workers within 14 days. This provision is obviously vital to the waiting, helpless injured worker. For that reason, it provides an excellent measure of the department's commitment to the humanitarian aims of the program.

Throughout the early 1970's the department fell grievously short of its obligation to make prompt initial payments. But in mid-1977 its performance changed dramatically for the better. Since then it has continued to come closer to fulfilling the letter of the statute.

During the last six months of 1980, 93 per cent of all initial State Fund checks were sent within 14 days; the remaining 7 per cent were delayed less and less.

This compares favorably with the performance of the "private enterprise" segment of our workers' compensation program. Self-insuring employers and their service companies currently meet the 14-day requirement in only about 80 per cent of time-loss claims.

MEDICAL BILL BACKLOG CLEARED UP

The department's success in cleaning up a massive backlog of unpaid doctor and hospital bills is evidence that it can tackle and solve a challenging administrative problem.

Unpaid bills peaked at 153,000 -- an intolerable three-month backlog -- in January, 1977. The issue was not a matter of mere bookkeeping. Unpaid, disgruntled doctors and hospital administrators inevitably impair the quality of injured worker care.

Once the department zeroed in on the problem, the backlog was cleaned up in 90 days. That was 45 months ago. Since then, each end-of-month tally has shown doctor and hospital bills being processed efficiently and paid promptly. Currently, about 85 to 90 per cent of the 65,000 to 70,000 bills received each month are paid within 30 days.

* * * * *

With regard to medical and hospital billings, as with regard to so many aspects of workers' compensation, the intrusion of hundreds of private insurance carriers into the system introduces needless complexity and confusion. Surely it is easier for the doctor or the hospital to bill a single state agency for all claimant services provided than to sort out which among a welter of insurance companies is handling the claims of which patients.

FEW DEPARTMENT DECISIONS ARE APPEALED

About 241,000 claims were received by the department during FY 1980. In only one case in every hundred did the injured worker file an appeal disputing any of the many determinations associated with his or her claim. Most of those appeals were resolved either by the department reassuming jurisdiction (that is, agreeing to take another look), or by informal conference.

Employers filed only 180 appeals in calendar 1980. The question naturally arises: If the present system so chronically malfunctions, why did employers resort to their lawyers only about once in every 1,300 cases?

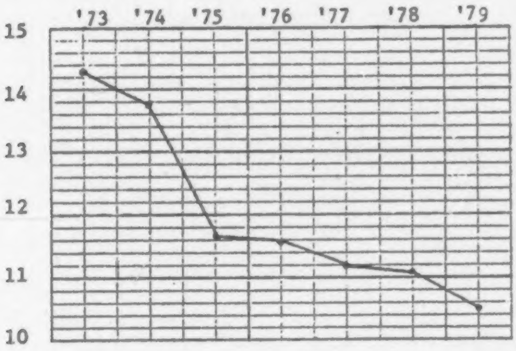
Each year since 1973, only about 1 percent of all claims have involved either worker or employer appeals. Here are the figures:

Fiscal Year	Total Claims Filed	Total Appeals	Appeals as % of Claims
1973	156,833	1,749	1.11%
1974	170,568	1,425	.84
1975	177,274	1,481	.84
1976	183,466	1,881	1.03
1977	198,195	1,753	.88
1978	214,972	1,969	.92
1979	227,928	2,544	1.12
1980	241,200	2,397	.99

Year After Year, The Toll Is Less

The graph of Washington State's on-the-job injury and illness rate has declined steadily each year from 1973 to and including 1979, latest year for which data are available. Over that span, the number of recordable accidents and illnesses per 100 fulltime workers dropped from 14.3 in 1973 to 10.5 in 1979, or 26.6 per cent.

WASHINGTON STATE, 1973 - 1979 INCLUSIVE
INCIDENCE OF REPORTABLE ACCIDENTS AND INJURIES



Only a fundamentally sound program could yield results so impressive. They reflect the fact that the 200 men and women of the safety division staff have a clearly-defined mission and an imaginative coordinated plan to achieve it.

At the heart of that plan is the Washington Inspection Targeting System (WITS). This system enables the division to center its inspection activity on high-risk employers and industries. Inspection priorities are determined by actual accident reports, county by county, industry by industry, and within industries, employer by employer. "Worst first" criteria are used to make the most efficient, cost-effective use of inspectors and hygienists.

Based on six-week-old compensable claims data from the computerized industrial insurance records of the Department of Labor and Industries, the program is the most sophisticated in the United States. It stands head and shoulders above the methodology used in three-way states.

The data are reliable because employer-employee-physician reporting is standardized and centralized through the State Fund, not diffused among a host of insurance companies.

Private-insurance states base their inspection priorities on federal Bureau of Labor Statistics data that are far less accurate and detailed, and that are at least two years old. The advent of three-way in Washington State would inevitably corrode the accurate data base that underlies this inspection system that has been demonstrably effective in reducing job accidents and saving workers' lives.

The safety division's inspection function is complemented by its work in safety training, education and engineering. Here the goal is accident prevention through voluntary compliance with safety and health standards. Accident-prevention programs are tailored to individual employers and individual work sites. Experienced, professionally-qualified industrial safety engineers and educators are available for free on-site consultations upon the request of any employer.

The effectiveness of these segments of the safety division's work was attested to in an October, 1979, performance audit by the Legislative Budget Committee. LBC found that 94 per cent of employers using the voluntary compliance service found it helpful, and 90 percent of employers using the division's safety education and training service responded with favorable comment.

Where is the insurance company that can offer the employer comparably diverse andprofessional services in safety and health education and training and the careful designing of tailor-made accident-prevention programs?

# # # # # # #

Loggers are alive today because dedicated and imaginative administrators have zeroed in on the hazards of that industry with an effectiveness no combination of private insurance company safety people could possibly match.

The year 1979 was marked by 33 fatalities in logging, up from 24 in 1978 despite the safety division's special emphasis inspection program. But in 1980, the cumulative impact of four years of special emphasis paid off with a reduction to only 18 fatalities, an all-time low.

Five of the 18 were directly connected with the eruption of Mount St. Helens. Only 13 fatalities -- about half the annual average -- may be said to be typical of past logging deaths.

HOW THE STATE FUND CAN CUT SMALL EMPLOYERS' COSTS

The small enterprise is inherently difficult to insure inexpensively. In insurance terms, it lacks the "credibility" to enable an insurance company to charge a low premium rate, or to offer discounts or dividends.

Our State Fund, in contrast, can offer reasonable rates to small firms because it escapes market place constraints which operate in states where private insurance carriers have been admitted to the program.

Many small firms have outstanding accident-free records. But small firms *as a class* have a higher incidence of claims. They also require higher overhead expenses per unit of premiums In a competitive situation, no insurer -- not even a State Fund -- can knowingly write an identifiable portion of its business at a loss. Suppose the State Fund, in competition with private carriers, were to offer insurance to small firms at standard rates. The State Fund would get *all* of that segment of the business. Private carriers would not match the State Fund offe because they would know in advance that insuring small firms as a group at standard rates is a losing proposition.

The State Fund, too, would lose money on the group, drivin up the prices it would have to charge larger employers to make up the loss. Other insurers, having avoided the financial burd of insuring the small employer, would be able to offer better prices to the better risks, capturing that portion of the marke The State Fund would then be forced to raise its rates for the small firms. The alternative would be continual underwriting losses and a poor competitive position.

Under the present system, the State Fund can give recognition to the obvious fact that being small does not in itself cause accidents. The safety-conscious small firm is not penalized merely because it happens to fall in an identifiable group that contains a disproportionate number of poor insurance risks. It is penalized only if its own accident record is poor.

The State Fund does lose money on those small employers who are poor insurance risks. The loss is spread out over the premiums of all firms, large and small. In a competitive situation, by contrast, the good small firms end up bearing the heaviest burden.

The absence of market place constraints also enables the State Fund to merit rate small employers. In a competitive situation penalties against the few small firms with accidents during a given year cannot reasonably be set high enough to offset the credits for the many small firms who have no accidents, unless the credits are so small as to be meaningless. An effective merit rating program necessarily results in a modest decline in premium income from that segment of the business. Merit rating of small employers is impossible under three-way because no insurer (including the State Fund) can write coverage at a loss for the reasons discussed above.

Merit rating of small firms, with its accident-prevention incentive, would disappear with the advent of three-way in the State of Washington.

HEAVY EXPENSE LOADING IN PRIVATE CARRIER PREMIUM DOLLAR

The National Council on Compensation Insurance -- the insurance industry's rate-setting arm -- assumes that insurance companies need about 39 cents of each premium dollar to pay expenses and make a modest profit when handling small employer accounts.

In Minnesota, a typical private insurance state, permissible expense components for insurers of small employers are these:

	Per cent
Acquisition (sales) expense	17.5
General administration expense	8.4
Claims adjustment expense	8.2
Taxes	2.7
Profit and contingencies	2.5
TOTAL	39.3

Under our nonprofit State Fund operation, total expenses of the program run about 7 cents of the premium dollar. Earnings on investments, plowed back into the program, more than take care of all expenses.

PRIVATE CARRIERS RIG RATES TO FAVOR BIG BUSINESS

Using three-way Oregon as an example, here are some of the insurance company practices that discriminate in favor of the bigs and against the smalls.

Experience (merit) rating: In Oregon, employers paying less than $750 in annual premium are not eligible for experience rating. The $750 cutoff would have eliminated tens of thousands of employers in Washington last year. But under Washington's nonprofit State Fund system, experience rating is used for all employers, regardless of size, who have reported in more than one year of the three-year experience period. Every small firm with accident-free experience receives a 10 per cent credit. Small firms experiencing a serious accident are cushioned by a 25 per cent limit in the annual change in their experience modification.

Minimum premiums: In three-way Oregon, the minimum premium for most classes of employers is now $250 a year, up from $100 just two years ago. In Washington, the minimum premium remains $10 in any one quarter, or $40 for a year.

Expense constants: The expense constants imposed by the insurance industry are the same dollar amount for all employers but they have the effect of penalizing the small employers. In three-way Oregon, all employers pay a $35 expense constant. Washington has no expense constants.

Premium discounts: In three-way Oregon, only employers paying more than $1,000 in annual premiums qualify for premium discounts. That $1,000 floor would have denied discounts to 62,000 Washington employers in 1977, the latest year for which data are available. Discounts are scaled so that the larger the employer's premium volume, the greater the discount. The base or manual rates set by the insurance industry's rating bureau are loaded to pay for these discounts. It's another instance of the smalls subsidizing the bigs.

Washington doesn't offer premium discounts of that kind. It does, however, offer a substantial across-the-board discount each year on all premium rates in anticipation of earnings on investments.

Dividend plans: Oregon State Insurance Division records show that insurance carriers overcharged employers nearly $200 million between 1966 and 1977 to finance a dividend system providing insurance refunds to selected larger employers. The overcharges were loaded into manual rates established by the insurance industry's rating bureau.

Lester Rawls, former Oregon insurance commissioner, says that dividends aren't fair even to those employers who eventually get them. "It's a triple whammy," Rawls told the Oregon Journal in 1978. "First, the insurers get free money that they can invest until they have to give it back a year, two or three later. Second, the investment earnings aren't considered officially in the ratemaking process, and therefore don't do the employer any good in producing a lower insurance rate. Third, the employer who pays the overcharge doesn't have the use of this money as capital for a long period of time before getting some of it back in shrunken dollars."

Oregon's State Fund is mired in the swamp of insurance industry practices. In 1978, latest year for which figures are available, it paid $28.5 million in dividends, with the entire amount going to only 13,459 (26 per cent) of its 50,517 customers.

Even with a perfect safety record, no Oregon employer paying less than $2,000 in annual premiums is eligible for dividends.

Cash flow: In three-way states like Oregon, the private carriers collect a full year's premium at the beginning of each year, whereas Washington's State Fund collections are quarterly, at the conclusion of each quarter. The significant cash flow difference benefits Washington's smaller employers, struggling for a foothold in the economy.

A COMPARISON OF RATES IN OREGON AND WASHINGTON

Direct comparison of premium rates paid by employers in Washington under the State Fund with those in Oregon under three-way insurance shows that Washington rates are consistently often dramatically, lower.

Here are January 1, 1979, rates chosen from industries common to both states. Washington's rates have been expressed in terms of payroll to permit comparison with Oregon's.

PREMIUM RATES PER $100 OF PAYROLL

	Washington	Oregon
Logging	$13.00	$36.14
Sawmills, shake and shingle mills	10.88	18.20
Road construction--surfacing	5.68	15.34
Fruit packing, fresh	4.05	10.99
Auto repair shops	3.49	7.98
Restaurants or taverns	2.83	6.30
Dairy farms	6.39	14.50
Clerical Office employees, draftsmen	.16	.57
Accounting or bookkeeping firms	.11	.65
Salesmen, collectors, messengers--outside	.45	1.42
Grocery and meat stores combined	2.40	7.98
Real estate agencies	.43	1.42
Statewide average premium rate	2.40	6.10

A comparison of 1980 rates for all risk classifications is available upon request from the department. Differentials in most risk classifications are comparable to those listed above.

The Oregon rates listed are manual rates. They are modified by minimum premiums and expense-constant penalties imposed on small employers, and by discounts and dividends made available t large employers.

IS OUR STATE FUND REALLY A 'NIGHTMARE,' AS THREE-WAY ADVOCATES SAY?

"The State Fund is a monopoly...it's too big...it needs the spur of competition...costs are going out of sight...claims are bottlenecked... rehabilitation is delayed..."

For years and years, three-way advocates have hurled such charges. We respond to some of them here.

WHAT ABOUT THOSE "ESCALATING COSTS"?

"Premium costs have skyrocketed," this year's three-way brochure asserts. Under private enterprise, it assures us, "runaway program costs would be kept at reasonable levels."

What are the facts? Premium rates for Washington employers and Washington workers did rise substantially in the mid-Seventies. The increases were needed to build fund reserves to an actuarily safe level. They achieved their purpose -- the Accident, Medical Aid and Supplemental Pension Funds all have ample reserves today.

But during the calendar years 1978, 1979 and 1980, the department reduced premiums an average of 12 per cent. This year, for the first time since 1977, premiums are expected to rise, but only by an overall average of about three per cent.

In the context of the extravagant climb of medical and hospital costs and the more modest liberalization of injured worker benefits, the department's success in holding premium costs down is impressive indeed. Not a single private-carrier state has done as well!

In any case, the bottom line is today's Washington rates compared with insurance-industry dictated rates in other states. As we have reported elsewhere, Washington rates compare very favorably with those in three-way states.

In considering costs, it's important to note that Washington employers enjoy two advantages unique to this state.

First, workers share in funding the Medical Aid and Supplemental Pension programs. In fiscal 1980 alone, workers paid $81 million into those funds.

Second, Washington is the only state whose premium rates are not inflated year after year automatically in proportion to the rise in payroll volume.

In all other states, premium costs rise each year because they are calculated as a fixed percentage of payroll. Even during years in which the percentage is unchanged, employer costs (and insurance company profits) escalate because every wage increase triggers a commensurate premium increase.

Washington is the only state to calculate premium rates as a fixed number of cents for each hour worked. Thus its premium income is unaffected by rising dollar volume of payroll. Employer (and worker) premiums go up only if the cents-per-hour rates are raised.

WHAT ABOUT CARRIERS' "SAFETY EXPERTISE"?

Most of us judge an insurance company's attitude toward safety by our experience with auto insurance. When an auto owner has an accident, the insurance company doesn't conduct a safety program. It cancels the policy.

Perhaps a more objective appraisal of the safety capability of insurance companies is afforded in the 1972 report of the National Commission on State Workmen's Compensation Laws. Appointed by President Nixon, the Commission included insurance executives among its members. Its report was unanimous.

The Commission noted that private carriers spend about 1.1 per cent of premium income on unspecified "safety services." (About 15 per cent goes for agents' commissions.) But its report added these comments:

"Small firms may be unable to finance their own safety programs and their carriers may find it prohibitively expensive to provide them with adequate accident prevention services." (Page 93.)

The Commission also expressed concern about "insurance carriers that do not provide an effective safety program for their their policyholders, especially those carriers doing a limited amount of business in a particular state. In some states there are more than 100 carriers writing workmen's compensation insurance. It is unlikely that they are all able to provide effective and comprehensive safety programs." (Page 93.)

Insurance carrier inadequacies are of particular concern in connection with occupational health hazards, whose range and impact are only now beginning to be widely recognized. Identifying and coping with these hazards requires trained professional hygienists and modern, sophisticated laboratory facilities. These are an integral part of the Washington State WISHA program. (The University of Washington's Department of Environmental Health is at the service of this state's working people.) But the Commission found that in the nation as a whole, such professionals "are not generally available except in large companies and in a few insurance companies." (Page 92.)

The Commission contends that experience rating is an effective accident-prevention incentive. But it notes that "firms with fewer than ten employees, however favorable their accident experience, are too small to be experience-rated." (Page 95.)

And again, "about 80 per cent of all firms are too small to be experience rated." (Page 96.) And yet again, "present methods of setting workmen's compensation insurance rates do not give small firms a strong incentive to improve their safety record." (Page 96.)

These comments apply to states where private carriers have a monopoly on the system. They do not apply in Washington, where even very small employers enjoy a measure of cost reduction for good safety performance.

IS THE STATE FUND REALLY "TOO BIG A BUREAUCRACY"?

The proponents of three-way contend that Washington's State Fund operation has grown "too big" -- that it's time to break it into smaller pieces, to parcel out the business to any of the 500 general casualty companies in this state who want to hustle out and get it.

Of course the program has grown. The state's economy and its work force have grown. Growth is inevitable -- but is size in and of itself an evil? Aetna, Firemen's Fund and Employers Mutual Liability all show workers' compensation writings comparable in volume to those of our State Fund. Liberty Mutual and Travellers Indemnity have roughly double our State Fund's premium volume. Is the insurance lobby advocating their dismemberment?

The three-way advocates base their "too big" charge on existing backlogs and delays in claims processing. We've met that argument elsewhere in these pages. When the froth has subsided, what's left is one bedrock fact: Labor and Industries last year administered the entire program -- processed 185,000 claims, operated a rehabilitation center, financed a statewide WISHA program, underwrote the cost of appeals -- and did it all on about 7 cents of the premium dollar.

The best-run insurance company in America couldn't even find its way into that efficiency ballpark, much less get on base when it got there.

Then there are the obvious advantages of being big -- advantages few insurance companies can even pretend to offer:

Specialization: Washington's industrial insurance division doesn't have to worry about fire, auto and half a dozen other lines of insurance. It concentrates on workers' compensation. Very few private carriers do that.

Minimal premium rates: Employers benefit from economies of scale. The more widely the risks can be shared among many insureds, the lower the rates can be held for all. The Ohio Manufacturers Association understands this concept. That's why it defends its State Fund against the three-way threat.

Uniformity of administration: Industrial insurance statutes are implemented uniformly throughout the state. They aren't subject to the whims, vagaries and misinterpretations of a host of insurance agents and claims adjusters representing hundreds of competing companies.

Legislative oversight: Distribute this state's workers' compensation writings to, say, 170 general casualty insurers (the number currently active in Oregon), and you lose not only uniformity, you lose touch with what's happening. Legislators concerned with keeping an eye on the program may have misgivings about the casual "parcelling out" of the claims load to all hands and the ship's cook, as advocated by the proponents of three-way.

WHAT ABOUT "MONOPOLY" VERSUS "COMPETITION"?

Three-way advocates first brandish the negative word "monopoly"to discredit the State Fund. Then they wave the positive word "competition" to persuade legislators to vote for their bill. It's an old game, this exploitation of words with emotional overtones. Let's look beneath the vibrations to the substance.

Monopoly is bad when it means the domination of an industry for the private gain of a few at the expense of the many. It's bad when it means the power to jack up prices, to control markets, to overpower smaller enterprises.

Those social evils have nothing whatever do do with workers' compensation. The State Fund isn't in business for private gain. It provides an essential service to society, much like those other "monopolies," the police and fire departments. The evil connotations of monopoly just don't apply to public service agencies.

The current three-way brochure says that not only does the State Fund have no competition, it is not "regulated by any outside 'watchdog agency.'" In practice, the full range of operations of the State Fund is monitored by the legislature. Legislators have direct access to Labor and Industries staff for full and prompt disclosure of the workings of the department. Legislators can and do direct that performance audits be made. Legislators have the final budgetary authority.

A given State Fund practice may be good or it may be deficient, but it will be uniform. It will be visible through a single open window, so to speak. It will be subject to evaluation and, if necessary, to corrective action.

With three-way, diffusion of coverages opens the way to diversity of practice. A multitude of companies (170 in Oregon), although theoretically subject to regulation, in practice would present staggering oversight problems. To single out one example: Under our nonprofit State Fund system, the investment of reserves is out in the open, subject to scrutiny. And the earnings on those investments are plowed back into the program, more than paying full administrative costs and helping provide injured worker benefits. But insurance company investments are shrouded in confidentiality. They do nothing to benefit the injured worker.

Three-way advocates flaunt the word "competitive," but rate-making competition is non-existent in a three-way system. An insurance industry rating bureau fixes manual rates high enough so that every carrier, however inefficient, can operate profitably. State Fund rates are set by the same insurance industry rate-making monopoly.

Price competition between carriers is confined to discounts and dividend plans. Rate structures guarantee that these are paid for by the smaller employer and benefit only the larger.

The real competition comes in "cutting costs," and that sounds fine until you remember that the principal cost of a workers' compensation program is benefits. "Cost management" is too often a euphemism for beating workers out of their entitlement. Competition to frustrate legitimate claims, to outfox injured workers, corrodes the system at its service-delivery core.

Here's what the staff of a legislative interim committee in three-way Oregon concluded in 1976: "Competition may be a hindrance in getting a job done efficiently. Too many competitors can bog the system down and render it inefficient." The interim committee staff recommended "that the legislature establish an exclusive state fund eliminating carrier-insured employers." That recommendation was based on the finding that "the private insurance carriers are a part of the layering of inefficiencies unnecessarily adding to the system's burdensome costs and hindering the effective delivery of services."

A WORKERS'
COMPENSATION
MISCELLANY

In which we summarize pertinent experience from other states and provide miscellaneous material for legislative reflection...

OREGON SYSTEM IN TROUBLE, RECENT STUDIES SHOW

Two thoroughgoing recent studies of Oregon's three-way system come to essentially the same conclusion: The system needs fundamental reform.

Workers' compensation "costs more in Oregon than in any other state in the union," the Oregon Journal concluded after a six-month investigation in 1978. The Journal reported that since the Oregon legislature enacted three-way in 1965, insurance rates "have risen 700 percent." Other findings:

- *"Rate competition is practically non-existent."*
- *"Insurers have little incentive...to hold down costs."*
- *"Medical costs...are almost completely uncontrolled."*
- *"In 1977 only about 47 cents per insurance dollar reached claimants or survivors."*

An Oregon legislative subcommittee's 14-month interim study led the staff to recommend:

- *"...that the legislature establish an exclusive state fund eliminating carrier-insured employers."*

That recommendation was based on the finding that "the private insurance carriers are a part of the layering of inefficiencies unnecessarily adding to the system's burdensome costs and hindering the effective delivery of services."

NEVADA BETTER OFF WITHOUT 3-WAY, STUDY SHOWS

After a thorough study of Nevada's state fund operation in 1979, the prestigious Stanford Research Institute concluded that "there is no reason to expect that...private carriers could add value to the workers' compensation system to a level commensurate with the additional costs involved."

SRI's experts strongly advised against completely restructuring Nevada's existing system to admit the private insurance industry. It recommended instead that Nevada adopt a two-way system with a self-insurance option much like Washington's.

SRI based its findings in part on the impact of private carriers on the premiums paid by employers. Under three-way, every Nevada employer would pay at least 10 per cent higher premiums, and 60 per cent of employers would pay at least 23 per cent more.

The very largest cost increase - 26.5 per cent - would be borne by the very smallest employers, those paying less than $500 in annual premium.

SRI also noted that "successful investment performance by the Nevada Insurance Commissioner (Nevada's state fund) can have a major impact on minimizing the Nevada employers' workers compensation costs."

"The performance level of the NIC investment portfolio can be evaluated and direct action can be taken if performance is not adequate. Not only is it difficult to evaluate or influence the investment performance of private carriers, but that performance has no effect upon their rates and only a modest effect on employers' workers' compensation costs."

The study examined carefully the argument that cuts in benefit costs made possible by insurance company resources and expertise would offset their substantially larger expense loadings. SRI found no basis for that assertion.

OHIO MANUFACTURERS ASSOCIATION CONDEMNS 3-WAY

Ohio, like Washington, is under siege by the insurance industry to go to three-way workers' compensation. But what the Association of Washington Business seems utterly blind to, the Ohio Manufacturers Association comprehends very clearly indeed: Under three-way, the insurance industry gets rich and the state's employers get soaked.

In its newsletter of March 23, 1979, the manufacturers compare state fund with private carrier performance:

	Insurance Agents' Plan	Present Ohio System
Benefits set by Legislature	$1.00	$1.00
Trust Fund earnings	.00	.22
NET COST OF BENEFITS	1.00	.78
EXPENSES:		
Commissions and sales cost	.175	
Loss adjustment expense	.115	.05
Miscellaneous and general	.08	
Taxes, licenses and fees	.04	
Safety	.02	.01
TOTAL EXPENSES	.43	.06
PROFITS	.02	____
TOTAL COST TO MANUFACTURER PER $1.00 IN BENEFITS	$1.45	$ .84

Says the Ohio manufacturers' newsletter:

"To put $1.00 of benefits in the hands of a claimant, it is estimated that a manufacturer insured by private carriers would pay around $1.45. To accomplish the same result today, under present law, it now costs the Ohio employers $.84. A difference of $.61 for each $1.00 paid in benefits.

"There is no middle ground on this issue," the association declares, "Insurance agents who are promoting costly private carriers are no friends of industry."

PRIVATE CARRIERS SOAK UP HALF THE PREMIUM DOLLAR

In three-way Oregon, "in 1977, only about 47 cents per insurance dollar reached claimants or survivors," reported the Oregon Journal after a six-month investigation of that state's program.

In New Jersey, the insurance industry has the program all to itself, unfettered by a competing state fund. A 1974 State Commission investigating New Jersey's program commented:

"The most tragic aspect of the Workmen's Compensation system in the state is the small percentage of premium which ultimately inures to the benefit of the worker. Despite the fact that over $1.2 billion was credited to premium income by insurance carriers from 1967-1971, only 41 per cent or $502.8 million ultimately found its way to the person for whom the system was formed, the worker."

A federal Workers' Compensation Task Force reported in 1977 that, nationally, only 52 cents of every premium dollar reaches the pockets of the injured worker.

Look at it this way. Working people want benefits to be as high as possible. Employers want the cost of the program to be as low as possible. These are conflicting goals. We come much closer to satisfying both goals under our non-profit State Fund, with its consistently high ratio of benefit payout to employer (and employee) premium pay-in.

PRIVATE INSURANCE ETHICS IN THE HOT TEXAS SUN

No one weeps more copiously for the injured worker than an insurance lobbyist hustling a three-way bill. The protection of that worker's rights, we are told, is the heartfelt concern of the entire insurance establishment, top to bottom.

In that connection, a 1976 study of workers' compensation in Texas is illuminating today, even though it is based on data that are twelve years old.

Of all 50 states, only Texas gives covered employers no option but to insure with a private carrier. Self-insurance is not permitted. No state fund exists. During the period reviewed in the study, regulation by the state was totally ineffectual. The carriers dominated the program.

Texas in 1969 thus presents the closest thing to a controlled laboratory environment for the "pure" operation of the insurance industry in the workers' compensation field.

In the study, Professor Sam B. Barton of North Texas State University analyzed a 4,268-case random sample from the files of the Texas Industrial Accident Board in 1968-1969.

He discovered that of the 4,268 cases, 2,050, or 48 percent, were settled by what is known as "compromise and release" agreements between the insurance company and the injured worker or survivor.

"Compromise and release" is a dirty word in workers' compensation circles. Such settlements were frowned upon by the prestigious National Commission on State Workmen's Compensation Laws. They have always been prohibited in Washington State.

Opposition to compromise and release is based on the fact that once a worker has signed such an agreement, the insurance company is totally free of downstream costs and responsibilities for that worker's claim. The worker has surrendered all future medical care, time-loss, pension and disability award rights.

Here's how Professor Barton describes the operation of compromise and release in Texas:

"As a profit-making institution...the insurance company would be expected to choose types of settlement that would minimize costs and maximize profits. How far those goals will be pursued at the expense of the worker's legal rights will depend on the ethics of the company and the alertness of the worker. Legally, any claimant can refuse the compromise settlement offered and appeal to board and court, but many workers are ignorant of their rights and of the nature of the compromise and release settlement. Frequently, the workers are under financial pressure to accept the lump sum settlement offered."

Barton found that of 48 *industrial fatalities*, 19 were compromised. Eight of the 19 were awarded *no* compensation; two were awarded $100 each; none received more than $2,000.

Of nine *job-related disfigurements*, six were compromised with case settlements ranging from $151 to $750. Barton comments that all six of these "inherently complex" claims were compromised without the participation of claimant attorneys.

Ninety-three *hernia* cases were compromised without attorneys. The median settlement was $283.30. Nineteen *occupational disease* claims were compromised without attorneys. The median settlement was $226.

Nearly half the claims in Barton's sample were compromised. And every compromised claim represents a worker or survivor whose legal rights were forever foreclosed in the interests of insurance company profits.

Of course, it would be different in Washington State. The competing State Fund, a stronger labor movement and other factors would moderate the ten-gallon harshness of Texas practice.

Still, it's worth weighing what's going on under the hot Texas sun before we scrap our long-established program at the behest of the insurance industry.

SELECTED READINGS ON WORKERS' COMPENSATION

1. Jacobs, William C., Address on "Workmen's Compensation -- Where We are, Where We Should be." Olympia: Department of Labor & Industries, August, 1970
2. Barton, Sam B., "A Statistical Description of a Permissively Administered Workmen's Compensation System." Denton, Texas: North Texas State University, 1976.
3. "Comparison of Workers' Compensation Rates in Washington, Oregon, Idaho, California." Olympia: Department of Labor & Industries, 1980.
4. "Workers' Compensation: Is There a Better Way? A Report on the Need for Reform of State Workers' Compensation." Washington, D. C.: Policy Group of the Interdepartmental Workers' Compensation Task Force, January 19, 1977.
5. Solberg, Harry J. and Carey, James J., "The Workers' Compensation System in the State of Nevada: An Evaluation of Alternatives." Menlo Park, CA: SRI International, March, 1979.
6. "Why H. B. 500 - The Private Carriers Bill - Should be Opposed." Columbus, Ohio: Series of articles from the Bulletin of the Ohio Manufacturers Association, 1967.
7. "Three-Way Workers' Compensation: What Would it Mean to Washington's Injured Workers." Seattle: Washington State Labor Council, AFL-CIO, 1975.
8. Burke, Tim, "The Impact on Premium Rates if the '3-Way-Option' System of Workmen's Compensation Insurance is Enacted in Washington." Olympia: Agriculture Committee of the Legislative Council, July 20, 1970.
9. "Vocational Rehabilitation Services for Injured Workers." Olympia: Department of Labor & Industries, January, 1980.
10. An Interim Report to Congress on Occupational Diseases. Washington, D. C.: U. S. Department of Labor, June, 1980.
11. The Report of the National Commission on State Workmen's Compensation Laws. Washington, D. C.: Published by the National Commission, July, 1972.
12. Workers' Compensation: Staff Recommendations. Salem: Subcommittee on Workers' Compensation of the Oregon Legislative Committee on Trade and Economic Development, November 15, 1976.
13. Final Report and Recommendations on the Investigation of the Workmen's Compensation System. Trenton, N. J., New Jersey State Commission of Investigation. January, 1974.
14. Sutherland, Don, "State Fund or Private Insurance. An Analysis Based in Part on Oregon's Experience." Salem: State Accident Insurance Fund, August, 1974.
15. Long, James, "Workers' Comp: Oregon's Hidden Tax." Portland: The Oregon Journal, October, 1978.
16. Price, Daniel N., "Workers' Compensation Program in the 1970's." Social Security Bulletin, May, 1979, Vol. 42, No. 5.

Senator **Nickles**. Thank you, Joe. We appreciate your comments.

Mr. Lewis, do you have a few comments?

Incidentally, your statements, and the entire statement that Mr. Gleason had, which was very lengthy—I was reading it last night and fell asleep before I was finished with it, but we will chew on it.

Mr. Lewis, go ahead.

Senator **Nickles**. We would like copies of those pictures, Mr. Leonard, if that would be possible.

Mr. **Leonard**. Certainly, we will get them for you. I am willing to work with your staff, take a couple of days to work with your staff. You will learn the waterfront. You cannot learn it in a few minutes.

Senator **Nickles**. OK, thank you.

Mr. Lewis?

Mr. **Lewis**. Thank you, Mr. Chairman. We have already introduced ourselves.

We are glad to have this opportunity to state our views on the Longshoremen's and Harbor Workers' Compensation Act, the amendments to it now under consideration, and the status of health and safety conditions in our industry.

ILWU represents approximately 13,000 workers on the west coast, Alaska, and Hawaii who are presently covered under the act. The vast majority of these workers are longshoremen, of course, but some are also cannery workers who perform some longshore functions in the course of their jobs, and some are harbor workers who service vessels in west coast ports.

It is now 9 years since the act was amended into its present form. The legislation passed in 1972 established a viable compensation program for the Nation's second most hazardous industry. Whereas prior to 1972, an injured longshoreman could often be legally disqualified from coverage or denied proper medical care and adequate benefits, the act now provides a realistic scope of program jurisdiction, a fair medical process, and reasonable protection against loss of income.

Once again, however, maritime employers are here in full voice, protesting what they describe as the unbearable injustice of being forced to provide for the needs of their injured workers.

Your bill, Mr. Chairman, S. 1182, and H.R. 25 in the House, sponsored by Representative Erlenborn, would effectively deprive thousands of injured longshoremen of the disability protection on which they and their families depend.

S. 1182 takes no account whatsoever of the technological changes in the longshore industry that have transferred much of the work from ship to shoreside. It would narrow the jurisdiction of the act so artificially that a longshoreman could indeed, as Senator Williams has pointed out, be covered one moment and not covered the next, or covered on one spot and not covered a few feet away. Many longshoremen would no longer be covered at all. Injured workers would be at the mercy of employer-nominated physicians, who would be under direct or indirect pressure to minimize disability and force workers off coverage before they are fit to resume work. Employers would have numerous loopholes to deny or delay the payment of benefits to injured workers. Monetary benefits would be significantly reduced in an industry which, in the last 20 years, has enjoyed a 500-percent increase in productivity and a 38-percent reduction in paid employees. We cannot, parenthetically, give you profit figures for the industry, because the industry has never provided any.

With the passage of S. 1182, in short, the Longshore Act would be effectively gutted.

Regarding the issue of jurisdiction, in introducing S. 1182 on the floor of the Senate, Mr. Chairman, you quoted a passage from Justice Marshall's opinion in the *Caputo* case as testimony that, one, the Longshore Act was intended by Congress only to fill the gap of coverage for areas not covered by State law; and two, that the 1972 amendments were intended only to end third party lawsuits and raise benefit levels. But you might also have quoted from the very next paragraph of that opinion:

> Congress in 1972 also realized that modern technology had moved much of the longshoreman's work onto the land, so that if coverage were not extended, there would be many workers who would be relegated to what Congress deemed clearly inadequate state compensation systems.

That opinion and that decision, I should emphasize, unanimously upheld the intent of Congress and the present jurisdictional definitions under the Longshore Act.

This, in a nutshell, is why the act's present jurisdictional definitions are fair and proper.

Concerning the act's benefit levels, we would call your attention to the fact that these same provisions, along with the provisions for scope of coverage, were enthusiastically supported by the industry in 1972, when longshoremen agreed to give up the right of third-party lawsuits based on the doctrine of seaworthiness. This trade-off saved maritime employers millions of dollars in litigation costs. Yet, strangely enough, while the industry complains so vocally against the benefit levels they supported earlier, not a single maritime employer has suggested that the third party tort option be restored.

Contrary to all the employer rhetoric that we have been hearing and reading in the newspapers, the real problems that exist under the act are that many employers violate many of its provisions, many workers fail to receive the benefits to which they are entitled, and many maritime employers are forced to pay unjustifiably high premiums to private carriers.

The solution to these problems is threefold. First, maritime employers must make a sustained commitment to improving safety and health conditions in the ports. For all the concern about high workers' compensation costs, management has traditionally resisted, rather than supported, ILWU's attempts to strengthen the Pacific Coast Marine Safety Code. Employer cooperation in this area could not only save lives and the health of our members, but reduce expenses under the Longshore Act.

Second, the Department of Labor should be given the resources it needs to properly administer the act, including its section 41, mandating health and safety policy. The provisions now present in the act to protect it from abuse should be actively enforced so as to process claims quickly and fairly. The recent budget cuts, which have resulted in a loss of 17 staff positions in the Office of Workers' Compensation Program's Longshore Division, will only increase the backlog of cases and reduce the Department's ability to police the act as it should. Even now, injured workers have to wait from 1½ to 3 years to go through the appeals process culminating with the Benefits Review Board.

Third, the role of private insurance carriers in workers' compensation should be examined by Congress, with a view to reducing excessive costs to employers. In the words of the Journal of Commerce, "Insurance accounting enjoys a bookkeeping language all its own." Moreover, over 35 cents out of every premium dollar paid to private insurance companies for workers' compensation coverage goes to inflated overhead expenses and tax-exempt reserve funds. Even the Washington Post editorial this morning, which we thought was pretty bad, though at least more restrained than some others we have seen, made a point of saying that less than 60 cents out of every premium dollar paid to private carriers goes to workers' benefits.

The National Association of Insurance Commissioners, the U.S. Department of Justice, and consumer organizations have all complained in recent years that privately carried workers' compensation does not perform efficiently. Some employers have complained, as well, and even some spokesmen within the insurance industry, I should emphasize. It would be cruel and unfair to penalize injured workers and their families without first addressing other methods of lowering insurance costs.

S. 1182 would take none of these positive steps and would merely inflict hardship on thousands of injured workers. It would emasculate a program which is based largely on the 1972 recommendations of the National Commission on Workmen's Compensation Laws, and which has served for years as a national model for many State programs. Passage of this bill would undoubtedly trigger similar attacks at the State level that would affect millions of workers not covered by the Longshore Act.

We would like to elaborate on all of these considerations, Mr. Chairman, but because our time is limited, we will address them in as much detail as you would like in the question-and-answer period.

But I want to point out that several weeks ago, ILWU President Jim Herman extended an invitation to you and through you, to the subcommittee, to visit one of our ports so that we could clarify some of the present-day realities of longshore work. In particular, we had hoped to show you the full extent of the transfer of work from ship to shore side, and the various types of work hazards which longshoremen must undergo on a daily basis. You replied that you were unable to accept our invitation, but we would again ask the subcommittee not to take such drastic action as is embodied in your bill, simply on the basis of accusations and claims that are made by maritime employers and the insurance industry. We would urge you to examine this entire situation from the point of view of the injured worker as well as the employer.

Mr. Chairman, I feel I should also address very briefly something that was said this morning which I think will be of interest to you. A great deal has been said about the issue of diversion of cargo through Canada and Mexico. It is really very interesting that that is being raised here, because, as it happens, the House Merchant

Marine Subcommittee is holding hearings tomorrow on this very issue, centered around a bill introduced by Congressman Biaggi, and a completely different range of factors contributing to the diversion of cargo to Canada and Mexico are going to be discussed. In fact, I have no doubt that many of the interests that are represented here today to testify about the Longshore Act are also going to be represented at those hearings tomorrow, and the emphasis will be put on a completely different set of factors. These include the role of intermodal international carriers who are able now to solicit American cargo without calling at American ports to pick them up and without filing their rates with the Federal Maritime Commission. It also involves the fact that the Canadian Government is presently subsidizing its transportation facilities at a much higher rate than the United States does, while in fact, the United States is cutting its subsidies. The point of this is simply that the Longshore Act is only one factor to consider in the diversion of cargo.

I would also like to say, in view of the graph that we have seen, and the issue of skyrocketing claims under the act, that something needs to be emphasized very strongly here, and that is that in 1972, additional claims under the Longshore Act were intended, predicted, and desired by the industry, which agreed to the changes. The whole point of the amendments to the 1972 act was to eliminate the third party option and make the act the sole resource for injured workers, except in cases of third party lawsuits for outright negligence. So naturally, as everyone foresaw and predicted and expected, there was a massive increase in claims. Also contributing to that, of course, was the extension of jurisdiction under the act, which did bring a large number of new workers into the act, as Congress intended.

Finally, Mr. Chairman, you raised some questions earlier as to the demonstration conducted by our San Pedro local, on the subject of your bill. I want to emphasize in the first place that that work stoppage that took place on Monday was intended not to gainsay the right of Congress to conduct hearings, to consider legislation, to consider different methods of improving the act. We are fully in favor of Congress doing that. That is why we participate in these hearings. That demonstration conducted by our local in San Pedro and other unions in the San Pedro area in the maritime industry was directed particularly toward the provisions of S. 1182, which they saw as a very unfair and dangerous challenge to the present provisions of the Longshore Act, as they protect injured workers and their families who have to depend on this act to protect them in the second most dangerous industry in the country.

Unlike U.S. Senators or Members of Congress, workers cannot introduce legislation; they cannot pass it; they cannot conduct hearings that go into the public record. For this reason, the only weapon that a worker has, and the only real means of making his views felt in the strongest way, is a work stoppage. So our members in the San Pedro area felt strongly enough about this bill that they took that action.

[The prepared statement of Mr. Lewis and additional material supplied for the record follow:]

INTERNATIONAL——WASHINGTON OFFICE——
LONGSHOREMEN'S & WAREHOUSEMEN'S
UNION
1133 - 15th Street N.W. Washington, D. C. 20005 • (202) 463-6265

JAMES R. HERMAN
President

RUDY RUBIO
Vice President

GEORGE MARTIN
Vice President

CURTIS McCLAIN
Secretary-Treasurer

STATEMENT BY THE
INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION
IN LEGISLATIVE HEARINGS ON S. 1182 AND THE
LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT
CONDUCTED BY THE
SENATE SUBCOMMITTEE ON LABOR
WASHINGTON, D.C.
JUNE 17, 1981

STATEMENT SUMMARY

ILWU strongly opposes the amendments to the Longshoremen's and Harbor Workers Compensation Act embodied in S.1182. These amendments would effectively deprive thousands of injured longshoremen and other workers of the disability protection on which they and their families depend.

The bill takes no account whatsoever of the technological changes in the longshore industry that have transferred much of the work from ship to shoreside. It would narrow the jurisdiction of the Act so artificially that a longshoreman could be covered one moment and not covered the next, or covered on one spot and not covered on another spot a few feet away. Many longshoremen would no longer be covered at all.

Injured workers would be at the mercy of employer-nominated physicians, who would be under direct or indirect management pressure to minimize disabilities and force workers off coverage before they are fit to resume work.

Employers would have numerous loopholes to deny or delay the payment of benefits to injured workers.

Monetary benefits would be drastically reduced--in an industry which in the last 20 years has enjoyed a 500 percent increase in productivity and a 33 percent reduction in paid employees.

The solution to the problems that exist under the Longshore Act lies not in cutting benefits for injured workers but in improving workplace health-and-safety programs; increasing funding and staffing for the DOL Office of Workers' Compensation Programs' Longshore Division so that it can better administer the law; and regulating the private insurance industry so as to improve servicing of workers' claims and reduce excessive premium charges.

S. 1182, however, would merely penalize innocent workers without taking any of these positive steps. It would emasculate a program which is based largely on the recommendations of the National Commission on State Workmen's Compensation Laws and which has served since 1972 as a national model for state programs. Passage of this bill would encourage similar attacks on state compensation laws covering millions of other American workers.

Mr. Chairman and members of the Committee: We are glad to have this opportunity to state our views on the Longshoremen's and Harbor Workers' Compensation Act, the amendments to it now under consideration, and the status of health-and-safety conditions in our industry.

ILWU represents approximately 13,000 workers on the West Coast, Alaska and Hawaii who are presently covered under the Act. The vast majority of these workers are longshoremen, but some are also cannery workers and harbor workers who service vessels in West Coast ports.

It is now nine years since the Act was amended into its present form. The legislation passed in 1972, based on the recommendations of the National Commission on State Workmen's Compensation Laws, established a viable compensation program for the nation's second most hazardous industry. Whereas prior to 1972 an injured longshoreman could often be legally disqualified from coverage, or denied proper medical care and adequate benefits, the Act now provides a realistic scope of program jurisdiction, a fair medical process, and reasonable protection against loss of income.

Once again, however, maritime employers are here in full voice, protesting what they describe as the unbearable injustice of being forced to provide for the needs of their injured workers. In the House, Rep. Erlenborn has reintroduced the same amendments that he sponsored last year in the form of H.R. 25, and Senators Nickles and Nunn have introduced S. 1182, which is identical in most respects. Similar attacks are being launched on the other two federal workers' compensation programs: the Federal Employees Compensation Act and the Black Lung Program for Miners.

Along with the particular merits of these three programs, we feel that your Subcommittee should bear in mind the reverberations an indiscriminate shredding of federal standards would have at the state level. Many state compensation laws are still woefully deficient, and those that have been improved in recent years are under constant attack. The Longshore Act in its present form was intended by Congress to serve as a model for state programs. A cruel and sweeping reduction in federal standards by Congress now would be the signal for new attacks on state protection of injured employees--attacks which would affect many more than the one million workers who are covered by the Act.

We also urge you to consider the difference between problems that are legislative in nature and those that are administrative. If the problems with the Act--e.g., high premium rates--about which maritime employers have complained so loudly were rooted in the Act itself, they would be uniform in every American port. The fact that they are not shows that they are a function of the administration of the law, not a function of the law itself or of its benefit provisions. The difficulties ILWU members frequently have in securing timely employer compliance with the Act are also traceable to administrative shortcomings.

It is hardly surprising that these problems exist, considering that the Department of Labor, despite improvements in recent years, has never had the staffing and resources it needs to police the Act thoroughly. The Department's Longshore Division has recently lost 17 staff positions due to budget cuts. We believe the Office of Worker's Compensation Programs should be expanded and more adequately funded, and we would support any administrative measures that can be taken to speed up the fair processing of claims.

S. 1182, however, would not address these problems. It would merely penalize the families of innocent workers who depend on this program for protection against occupational injury and disease.

Before considering the specific provisions of S. 1182, we would like to place the current debate over the Act in its proper perspective. In view of all the rhetoric--e.g., "irresponsible," "unaffordable," "fraudulent claims," etc., now blaring through the industry media, it may come as a surprise to those Senators and Representatives who were not here in 1972 to learn that the amendments to the Act of that year were enacted with the industry's enthusiastic support.

Those amendments were by no means a unilateral imposition of new expenses and obligations on shippers and insurers, nor were they an unconditional handout to shipside workers. They amounted to an open trade-off by which one system of benefits and legal protection was exchanged for another, to the mutual advantage of both sides. It was because of this that the legislation was passed with the almost unanimous support of all concerned--including the Nixon Administration--whereas previous attempts to amend the Act had all gone down to defeat.

The specifics of this tradeoff were very simple. Prior to 1972, injured longshoremen were compelled by the inadequacies of the Act to seek fair compensation through the courts in "third-party" lawsuits. These lawsuits, made possible by earlier U.S. Supreme Court decisions which applied the doctrine of "seaworthiness" to longshore work, rarely resulted in substantial court awards to injured workers. But the litigation costs involved were enormously expensive to the shippers and the stevedoring companies. Accordingly, the industry tried for years to secure legislation to remove the third-party option. In view of the deficiencies of the Act at that time, we resisted those attempts.

Then, in 1972, we arrived at the natural compromise. In exchange for the basic improvement of the Act into a program that adequately met the occupational injury needs of all longshoremen, the unions involved agreed to forego the right of third-party lawsuits, except in cases of employer negligence. With the enactment of this compromise, the industry was guaranteed millions of dollars in litigation savings. We had achieved what we thought was an equitable no-fault compensation program that would provide prompt and satisfactory care for injured workers.

The rhetoric the industry has used from that time on, however, might convince any uninformed listener that the 1972 changes were a diabolical plot by longshoremen to rob employers and drive them out of business. The industry has contested some of the most important provisions of the Act--in particular, its scope of coverage--with the result that until recently a cloud of uncertainty surrounded the Act from region to region, with insurers resisting many legitimate claims and workers being denied coverage while everyone waited for these issues to be resolved in court.

The Caputo, Pfeiffer, and other U.S. Supreme Court decisions in the late 1970s, however, have definitively cleared the air. We believe that if the Department of Labor is given the resources it needs to properly police the program, the Act as now written can continue to satisfy the needs it was intended to satisfy.

It is in the background of this history that we now consider S. 1182. If the Act were to be returned to its pre-1972 character--which is the substance of this bill--we would have no choice but to request that the third-party lawsuit option, the other side of the 1972 equation, likewise be restored. But we ask your committee not to return injured longshoremen and shipyard workers to the era when they could expect little or no assistance from this program.

The action that we respectully recommend that you do take is to investigate the very real problems related to health and safety that do beset the stevedoring industry: needlessly unsafe working conditions and a completely arbitrary, profit-oriented insurance system.

But before elaborating on these considerations, let us consider the specific provision of S. 1182.

Jurisdiction

The Longshore Act was first enacted in 1927 to provide coverage for longshoremen and harbor workers who were ineligible for coverage under state worker's compensation programs because they worked over "navigable waters," outside state jurisdiction. For years after, however, the question of precisely where state coverage ended and Longshore coverage began was thrashed about in court, with injured longshoremen often being deprived of the Act's coverage simply because of where they happened to have been standing at the time of injury.

Judicial attempts to draw this demarcation line at "water's edge" often led to ludicrous results. In one memorable consolidated case in 1969, a federal court of appeals denied coverage to three longshoremen who had been knocked onto a pier or crushed against a railroad car by a moving crane, on the grounds that the pier on which they were working was on the landward side of "water's edge." The court ruled that a fourth worker injured under the same circumstances was covered because he was knocked off the pier into the water--a doctrine, as Supreme Court Justice William O. Douglas observed, literally of "where the body falls."

The question of jurisdiction has been especially crucial to our members since 1960, when the technological changes that have revolutionized our industry began to take effect. As you know, the advent of containerization, and the introduction of modern cargo-moving machinery over the last 20 years have completely changed the nature of longshore work. Whereas the worker once performed nearly all of his work aboard ship, on the pier immediately adjoining, or on the gangway, he may now spend a good deal or all of his time either in a vehicle or in a containerized freight area a considerable distance away.

One of the most important provisions of the 1972 amendments to the Longshore Act resolved the problem of program jurisdiction in the simplest, most logical way: by defining as eligible "any longshoreman or other person engaged in longshoring operations," and a covered employer as "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

S. 1182 would return us to the swamp of on-again, off-again coverage and make it impossible for the Act to function in a consistent, coherent manner. It resurrects the "point-of-rest" concept under which a longshoreman working on containerized cargo would only be covered when working in "the area on the pier, wharf, or terminal to which inbound cargo is *immediately* transported after the unloading of a vessel, or the area from which cargo is *immediately* transported to the vessel for loading [our emphasis]." A longshoreman working on noncontainerized cargo would only be covered when working in "the area on the terminal facility, pier, elevator, or wharf which is assigned for the receipt of inbound cargo from the vessel and from which inbound cargo *may be* delivered to the consignee, or the area which is assigned for the receipt of outbound cargo from shippers for vessel loading."

In addition, to be covered, an eligible longshoreman is defined as one who is "*directly* engaged in activities relating to such employment and whose primary duties relate to such employment *when the injury resulting in such person's disability or death occurred*." Specifically excluded from coverage are workers who at the time of injury are engaged in "administrative, clerical, custodial, delivery, maintenance, or repair of gear or equipment, security, timekeeping, rail car loading and unloading, mechanical, truck loading or unloading, warehousing, or any other employments not direct and integral parts of vessel unloading, repairing, building, or breaking."

Under S. 1182, in short, a longshoreman could be covered one minute and not covered the next, or be covered on one spot and not covered a few steps away. The language of the bill would specifically exclude many workers from coverage, and the jurisdictional ambiguities it would create for many job functions it does not specifically mention would give insurers an incentive to deny coverage in many cases until directly compelled to do so. This would result in many more disputed claims and lengthy administrative appeals, and would enormously increase the administrative costs of the program.

We should emphasize again that this approach to the jurisdiction issue is not by any means being considered here for the first time. The legislative history of the bill that amended the Act in 1972 makes it clear that one of Congress's chief purposes was precisely to discontinue the "water's edge" concept. As the Senate Committee on Public Welfare's report on the bill observed:

"It is apparent that if the federal benefit structure embodied in [the 1972 amendments] is enacted, there would be a substantial disparity in benefits payable to permanently disabled longshoremen, depending on which side of the water's edge the accident occurred, if state laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoremen's work is performed on land than heretofore.

"The Committee believes that the compensation payable to a longshoreman... should not depend on the fortuitous circumstance of whether injury occurred on land or over water."

The U.S. Supreme Court, not once but twice, has unanimously ruled in favor of a realistic definition of maritime employment. [Northeast Marine Terminal vs. Caputo, 1977, 432 U.S. 249; Pfeiffer Co. vs. Ford, 1979, 62 L Ed. 2d 225].

In introducing S. 1182 on the floor of the Senate, Chairman Nickles saw fit to quote a sentence from Justice Marshall's opinion in the Caputo case as testimony that 1) the Longshore Act was intended by Congress only to fill the gap of coverage for areas not covered by state law, and 2) the 1972 amendments were intended only to end third-party lawsuits and raise benefit levels. He might also have quoted from the very next paragraph of the opinion:

"Congress, in 1972, also realized that modern technology had moved much of the longshoremen's work onto the land so that if coverage were not extended, there would be many workers who would be relegated to what Congress deemed clearly inadequate state compensation systems."

Justice Marshall went on to elaborate: "Unlike traditional break-bulk handling, in which each item of cargo must be handled separately and stored individually in the hold of the ship as it waits in port, containerization permits the time-consuming work of stowage and unstowage to be performed on land in the absence of the vessel. The use of containerized ships has reduced the costly amount of manpower required to get the cargo onto the vessel. In effect, the operation of loading and unloading has been moved shoreward; the container is a modern substitute for the hold of the vessel."

For these reasons, ILWU opposes any change in the language of the Act's scope of coverage.

Medical Protection

It has long been a basic tenet of every legitimate compensation program that an injured worker should have a free choice of physician, subject to commonly accepted professional standards. To any worker in a hazardous industry, the prospect of being forced to accept treatment from an employer-nominated physician in order to remain eligible for compensation is simply frightening. No doctor whose employer/sponsor has a direct interest in minimizing medical costs and in having the injured worker declared to be in good health as quickly as possible can possibly make a fair, objective appraisal of the worker's condition.

In line with the recommendation of the National Commission on Workmen's Compensation, the 1972 amendments properly acknowledged this elementary truth by permitting injured longshoremen to select any physician authorized by the Secretary of Labor. The Secretary, moreover, is required to "actively supervise the medical care rendered to injured employees," and "shall require periodic reports as to the medical care being rendered to injured employees, shall have authority to determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished, and may, on his own initiative or at the request of the employer, order a change of physicians or hospitals when in his judgement such change is desirable or necessary to the employee."

This stress on the needs of the worker--which S. 1182 would remove--was written into the Act because even with the right to choose his own doctor, the injured longshoreman in immediate need of care has neither the time, nor, often, the physical strength to go through the process of compelling his employer or insurance carrier to meet compensation obligations promptly. He needs explicit, protective legislative language far more than does an employer or insurance firm, to whom the contesting of claims is merely part of the day's work.

For the benefit of those who imply that the present statute allows a longshoreman to stay home and fraudulently collect benefits at a moment's whim, it should be noted that under the present law an employer may request and receive a second examination of the worker by a physician of his choice. If there is basic disagreement in a case, the Secretary appoints a third and sometimes additional physicians to resolve the dispute. The worker must submit to examinations throughout this process to remain eligible for benefits. The Department of Labor, moreover, has adopted new fraud protection machinery which, as stated earlier, we would have no objection to improving and expanding.

Contrary to the circulating rhetoric, however, it is employers rather than workers who have become expert in abusing the Act. In ILWU's jurisdiction, there have been many cases of company attempts to improperly influence a claimant's selection of physician, or to influence the physician's medical opinion; cases of benefits terminated before the treating physician has authorized the claimant's return to work; refusals to authorize medical care requested by the claimant's treating physician; and delays and refusals to pay incurred medical bills. (If desired, we will be happy to document these cases.)

But S. 1182 would remove even the protection now provided by the Act and would confine the choice of physician in a given district to a list of doctors submitted by employers. It makes this provision doubly significant by further implying that when medical questions are raised in a case, only the employer may insist on an examination by another physician. In addition, the deputy commissioner of each district would be required to oversee medical care under the Act not in the primary interest of the worker, but "in order to provide for effective medical care at a reasonable cost."

Anyone with experience in labor relations knows what employers mean when they use the phrase "reasonable cost."

S. 1182, in fact, encourages employers to abuse the Act by specifically authorizing them to "reduce the payment of compensation during any period in which the employee's... wage earning capacity [has] increased," and by leaving open just how it will be determined whether the employee "fails to accept employment commensurate with his abilities."

The Bill also imposes new, inhibiting reporting requirements on referrals to medical specialists, and allows for no exceptions to these requirements "in the interest of justice," as does the present law. Though in cases of pre-existing impairments the employee could obtain a re-examination, the Bill would charge this examination to the employee.

We are also particularly concerned with the provisions of S. 1182 which purport to define occupational hearing loss. For those workers who were determined to have suffered a compensable hearing loss, the amount of the award would be insignificant in comparison to the worker's impairment. The method for evaluating hearing compensation claims is out-dated, not based on scientific evidence, and has, in fact, been revised by the organization that initially developed it (The American Academy of Ophthalmology and Otolaryngology).

High frequency hearing loss, which affects the ability to understand speech, is not considered. Aging and better ear correction factors, which have no scientific basis, would be used to reduce awards. The point at which a worker reaches 100 percent hearing loss is so restrictive that such a worker would not be able to hear noise in excess of the OSHA standard for an eight-hour day. In order to be eligible to even file a claim, a longshoreman would either have to quit his job or retire, due to the waiting period required.

These provisions of S. 1182 would, in effect, deny longshoremen compensation for occupational-induced hearing loss.

The basic issue to be decided here is simple. Is the purpose of the Act to provide adequate medical care for injured workers, or is it to make it seem that care is being provided when it is not? Congress clearly--and correctly--answered that question in 1972.

Benefits

The industry has complained that the financial burdens imposed by the Act's benefits are disproportionately heavy compared to those associated with other workers' compensation programs, and that high Longshore premiums are driving shippers and stevedoring companies out of business. Accordingly, S. 1182 would impose a new formula maximum of 80 percent of the employee's "spendable earnings," defined as average weekly pay minus federal and state tax deductions. It would limit annual percentage increases to three percent, and would offset compensation against income from social security, health disability insurance, pension, unemployment insurance, and other worker's compensation. Coverage for workers with permanent partial disabilities would be terminated at retirement age. These new limitations would deprive our members and their dependents or survivors of thousands of dollars in needed income.

It should first be noted that "80 percent of spendable earnings" is a formula based on inequality, since taxes vary between married and unmarried workers and from state to state. A cap of three percent on annual increases, moreover, really amounts to a far lower cap for long-term disabilities, since inflation each year is several times greater than 3 percent.

Concerning the more fundamental issue of the Act's benefit levels, as former Assistant Secretary Donald Elisburg observed:

"The 1972 benefit changes were designed to make the Longshore Act a federal model for state workers' compensation reform. Because the improved benefits in the Act and those recommended by the National Commission exceed those of most state laws, the longshore program is naturally 'expensive' by comparison."

Moreover, as the Senate Committee on Labor and Public Welfare pointed out in its 1972 report on the amendments to the Act: "adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, by assuring that the employer bears the cost of unsafe conditions, serve to strengthen the employer's incentive to provide the fullest measure of on-the-job safety."

The latter consideration is especially critical in view of the inconstant nature of the longshoreman's workplace. Unlike mines, factories, fields, and building sites, ships sail away and out of the purview of the government safety inspector. It is accordingly impossible to prove many claims of employer negligence and unsafe working conditions, and the enforcement deterrent supposedly provided by OSHA is all the less effective in our industry. We must rely much more on the financial deterrents imposed by the Act.

It is true that some smaller firms have suffered seriously from high Longshore premium rates, and we will have more to say on this problem. But if the overall financial state of the longshore industry is to be made an issue in relation to the Act, the industry's entire history over the last 20 years must also be examined. As noted previously, stevedoring has been completely revolutionized by a process of automation that started before longshoremen began to receive the benefits of the Act in its present form. This revolution affected the livelihoods of tens of thousands of longshoremen, and occurred largely at their expense. It was the most controversial issue in our union's history since the 1940s, and remains one of our most important concerns in collective bargaining.

Since 1960, when the work rule changes permitted by the Mechanization and Modernization Agreement were introduced on the West Coast, manhours have fallen substantially, while cargo tonnage has quadrupled. Productivity has increased nearly five-fold. Whereas in 1960, 16,000 longshoremen on the Pacific Coast handled 19.9 million tons of cargo, today 10,000 longshoremen move approximately 64 million tons.

To our knowledge, no other American industry has been so profoundly transformed in favor of increased efficiency and maximum output. Even the staff of the Nixon Pay Board acknowledged this in 1972 when it cited the industry's savings and improved performance as justification for making an exception to the Board's wage ceiling in order to accommodate the ILWU longshore contract settlement of that year.

Longshoremen, in short, have already made a more than generous contribution to the financial health of their employers. It is for this reason that we reject the suggestion that, simply because some maritime firms are in economic straits due to factors that are completely unrelated to the Longshore Act's benefits, our health-and-safety protection should now be curtailed.

We also have a word to say on the subject of inflation and the climate of "uncertainty" the supporters of S. 1182 complain is created for the Act's benefits and premium rates. It is certainly true that severe inflation makes financial planning difficult--especially for a worker with a family to support. But workers' compensation, contrary to the insurance industry's contentions, is in fact the one form of insurance that is inflation-resistant, with premium rates tied to employee earnings. Just as benefits go up with inflation, so do Longshore Act premiums and the industry's aggregate reserve funds. Moreover, as the Massachusetts State Rating Bureau recently observed in criticizing an excessive Longshore benefit escalator factor sought by the National Council on Compensation Insurance: "If one assumes that inflation continues unabated throughout the next 80 years to push up wages at the rate of 5 percent or even 6 percent annually, one assumes an economy which would enable one to invest policyholder funds without appreciable investment risk at a much higher rate of interest for the next 80 years."

Unlike longshoremen, moreover, insurance carriers have a further hedge against inflation through their percentage-of-wage premium rates. In looking back over the last nine years, we find that from the moment the Act assumed its present form, carriers have uniformly included protection against inflation in their carrying charges. Annual benefit increases under the Act, in contrast, have never exceeded eight percent since 1972. This "protection" is rather minimal, considering the rates of inflation in the 1970s.

The contention that benefits under the Act should be set against other forms of protective income is not new. Significantly, no actual figures of how many beneficiaries are actually collecting other benefits have yet been submitted, and one witness from the industry at the 1980 Senate oversight hearings who voiced this time-honored complaint admitted that he had no data on the problem.

It is interesting to note, however, that S. 1182 would offset Longshore compensation against other nonwage income by reducing the Act's benefits--which are financed by employers--against other federal, state and private benefits, which are financed by the taxpayers and the workers themselves. The public at large, in other words, would be subsidizing the employer's unsafe working conditions. Since state taxes vary, moreover, they would be doing it unequally.

This provision would also remove the basic deterrent to unsafe working conditions which worker's compensation is intended to provide. Why would an employer bother to make a serious effort to keep his workplace safe if he knew that the public treasury and the worker's own hard-won welfare programs would foot much of the bill for accidents?

Legal and Administrative Provisions

Whereas payments for disputed claims under the Longshore Act are currently continued pending final decision by the Act's Benefits Review Board, under S. 1182 they would be stayed in many cases. Workers' legal fees incurred in pressing claims would be paid only in cases where the employer has refused to pay any compensation and denied any liability under the Act. In enforcement proceedings, the current presumptions that a claim comes within the Act, that sufficient notice of the claim was given, and that the injury was not caused solely by the intoxication of the injured employee or by willful intent to injure, are all eliminated.

The burden of proof of total disability, or that a loss of wage-earning ability is due to a compensable injury, is placed on the worker. The employer is given additional loopholes to resist claims in cases where he did not have "actual" knowledge that "the injury or death was, or is claimed to be, employment related." S. 1182 even removes a requirement that the deputy commissioner investigate when a worker files a complaint that his compensation payments have been unfairly terminated.

The Bill would also take the Benefits Review Board out of the Department of Labor and give it a more autonomous--and ambiguous--status. Its members would be appointed by the President rather than by the Secretary of Labor.

All of these changes would operate to the serious detriment of injured longshoremen. They tip the scales of the program further in the company's favor, and institutionalize the employer's favorite assumption: that the worker seeking compensation does not need or deserve it. As we stated earlier, the injured worker in need of immediate care and income protection is in a far more vulnerable position than his employer or Longshore insurance carrier; and the provisions that S. 1182 would change provide for no more than a balanced contest. Even under the Act's present language, and despite the best efforts of the Department of Labor, we have cases of members virtually having been forced to accept settlements far below their proper entitlements.

One particularly ominous provision in S. 1182 relating to the calculation of benefits for partial disabilities reads: "If an employee voluntarily limits his income, or fails to accept employment commensurate with his abilities, the wage-earning capacity of the employee shall be considered to be the amount which would have been earned if the employee did not limit his income or if the employee accepted appropriate employment."

It is clear that the employer in each case would have the primary if not the sole say on what "commensurate with his abilities" means and what the worker's "wage earning capacity" is. Even under the language of the present Act, which ties benefits to the actual earnings of the worker, we have endless disputes over the health status of injured claimants. With the employer given free rein to deny or reduce benefits on the excuse provided in this and other provisions in S. 1182, cases of benefits improperly denied would increase drastically.

We also fail to see how separating the Benefits Review Board from the Department, and transferring the power of appointment of its members to the President from the Secretary--whose sole focus is labor and employment conditions--can enhance the Board's performance.

We have covered the most damaging provisions of S. 1182 in terms of its negative impact on workers who depend on the protection of the Act. If this legislation were adopted, the Act would be converted from an effective compensation program into a vehicle by which employers could seem to be providing adequate protection for their workers while in fact they were doing nothing of the kind.

But let us now return to the problems which we believe are really responsible for this attack on workers' protection: health-and-safety problems in the ports, administrative deficiencies, and an unregulated, profit-oriented insurance industry.

Health and Safety

S. 1182 would repeal the Longshore Act's Section 41, which mandates health and safety policy for employers and the Secretary of Labor. In view of the prevailing concern over high compensation costs, we are astonished at this, for it is a well-documented fact that the longshore industry is one of the most dangerous in the country. The most recent data compiled by the Bureau of Labor Statistics (for 1978) show that the injury and illness rate for marine cargo-handling operations is more than twice the national average. Even more significantly, the severity rate, computed on the basis of lost work days, is seven times greater than the national average, and four times the rate for the high-hazard construction industry.

This basic reality, which is very well known to our members, has been an important factor in the high costs of the Longshore Act. As we pointed out in the oversight hearings held by the Senate Labor Committee last September, if as much energy and resources had been invested to improve safety and health conditions as has been spent on contesting injured longshoremen's comp claims, phenomenal savings could have been made by the companies now claiming to be in severe financial jeopardy. We repeat what has always been obvious to ILWU members: the best way to alleviate the problem of workers' compensation costs is to reduce the risks of occupational injury and disease.

This might seem elementary, and if your subcommittee accepted all the claims of our employers and their insurance carriers, you would believe that job safety is their highest priority. You would also get the idea that almost all accidents in the ports are caused by careless longshoremen. This is simply not the case and never has been. It has been our experience that accidents are caused by speed-up, unsafe conditions, and other factors under the control and supervision of management.

In fact, our efforts to ensure safety and health have consistently met with bitter management resistance. Since 1934, we have had to fight to strengthen the Pacific Coast Marine Safety Code (the safety rules negotiated by the ILWU with the Pacific Maritime Association and part of our coastwide longshore contract). The industry's objections to specific safety measures are always the same: it would cost too much, there is no need for it, just work more carefully.

As an example, our efforts to ensure safety for longshoremen who work atop containers have been utterly frustrated. These men must work at the unguarded edge of a container often forty feet or more above the deck. We know of three instances where ILWU members have fallen to their deaths from the tops of containers, and have heard of other such cases outside our union. Our attempts to protect these men have centered on the use of cages, safety belts and life lines, and non-slip surfaces on the container tops. These are hardly unreasonable requests. (In Japan, for example, when work is to be performed on the top of a container, the work is done from within a cage which is securely attached to the crane.) Yet all have met with resistance.

We have the same problem in the loading of logs transported by river. In many cases logs are banded together in bundles approaching the safe working load limit of the gear which is to handle them. After lying in the water for an extended period of time, the logs absorb so much water that the bundle exceeds the safe load limit. When this is brought to the attention of the employer, however, the longshoremen are often instructed to hoist the logs anyway, since cutting the bands and hoisting fewer logs at a time would slow production.

We have many disputes with employers concerning the condition of cargo gear such as wire rope, shackles, padeyes, sheaves, and the like. When we point out unsafe gear to the employer, he often replies that the vessel has a valid cargo gear certificate and the gear must therefore be safe. Where we have been able to negotiate objective criteria in the Safety Code defining unsafe gear, we usually prevail in the dispute. Nevertheless, the employer will often take the union to arbitration in the hope that he will receive a favorable decision and not have to repair the gear, which would result in a loss of output.

Management is similarly irresponsible toward longshoremen who face hazards from exposure to chemical substances. Longshoremen employed at export grain elevators frequently service ships whose cargo has not been properly labeled as to the pesticides and fumigants which were applied to the grain. They have been exposed to from six to seventeen times the permissible exposure limit of grain dust, without the approved respirators. Seldom do employers measure the levels of chemicals, dusts, or other substances to which longshoremen are exposed. Under this cavalier policy, it is no wonder that claims under the Longshore Act are frequent.

It should be emphasized, moreover, that the need for effective safety programs in the ports has been especially critical in recent years. Since 1970, when the Nixon Administration terminated a longshore safety program that employed 90 experienced inspectors around the country, the industry has not been policed as it needs to be. Few OSHA compliance officers have the specialized knowledge needed to identify hazards in the longshore industry. Even those who have this knowledge spend only a fraction of their time inspecting longshore operations.

The advent of mechanization has also crucially affected safety conditions in the ports. It should not be supposed that containerization and other technological innovations have reduced work hazards. On the contrary, they have introduced a whole new generation of work-related risks and created a number of new, highly dangerous jobs.

Where vehicular accidents were once quite rare, for example, they are now commonplace, particularly in the discharging of container vessels. In this type of operation, a crane will remove a container from a vessel to the dock. From the dock, the container is transported to a storage location. This involves a considerable amount of traffic, whether straddle carriers or tractors with chassis are used. If chassis are used, longshoremen must be employed on the dock to secure the container to the chassis. Depending upon the design of the chassis, the longshoreman may have to go under it--and out of sight of the tractor operator--to secure the container. He is then especially vulnerable to accidents. This problem is compounded at night, when operations are carried on under poor visibility.

The mechanization of our industry, in fact, has led to such an increasing diversity of old and new hazards that it has become more and more difficult for our members to remain thoroughly up-to-date on vital safety information. No two cargo-laden ships have ever been alike, and the longshoreman has always had to learn his way around a new workplace each time he boards a vessel. In 1981, however, a longshoreman may be sent one day to unload coffee on a traditional break-bulk operation, and the next to the most modern of container handling operations. In this new variety of work settings, even a veteran's safety knowledge is spread very thin. Younger workers are even more vulnerable.

Many workers who have come into this industry in the last 10 years are particularly at risk because they have had little or no experience in the break-bulk operations which used to be the mainstay in longshoring. The result is that when international trade patterns change, resulting in increased traffic of older vessels from countries like China, these workers have to learn about the hazards of traditional cargo-handling virtually overnight. The complexities of rigging gear and operating winches cannot be learned in such a short period of time.

In recognition of all of these problems, the ILWU has obtained a grant from the Occupational Safety and Health Administration to improve safety conditions for longshoremen. We are developing a training program to address the hazards in the industry, have provided technical assistance, have conducted health and safety workshops, and are engaged in other activities to improve the conditions under which our members work.

Notwithstanding this, the responsibility to provide a safe and healthful place of employment rests with the employer. While not all of the health and safety hazards we have described can be eliminated, the vast majority could be reduced by proper technical and procedural measures, some of them appallingly simple. It is in this connection that we find out who is really concerned about minimizing health and safety costs.

Take several vivid examples: About a year ago, one of our crane drivers in Portland, Oregon became concerned about the danger that arose whenever another worker attempted to climb up to the cab of the crane while he was operating it. Occupied by his work and unable to see anyone climbing up the access ladder below and behind him, he knew that he was capable of rotating the crane and striking someone approaching the cab. With this in mind, he suggested to the employer that a warning bell be installed in the cab with a button at the foot of the ladder to be pushed by anyone climbing up. This, he was told, was technically unfeasible and financially undesirable. He went back to work, and shortly afterwards a company representative attempting to climb up the ladder was struck by the rotating cab and seriously injured.

At the Port of Sacramento last summer, one of our members was decapitated when a frayed mooring line, which should have never been in use, parted and struck him on the head. In January of 1979, at the Port of Los Angeles/Long Beach, two members were killed in separate instances while loading cotton bales. In one of those cases, a defective safety latch on the crane hook was responsible for the accident.

How many more workers must die or be severely injured before management takes the necessary steps?

It is incidents like these, not the financial costs of the Longshore Act, that truly measure the failings in job safety and health on the waterfront. If occupational safety and health become a primary concern of our employers, the costs of the Act would be greatly reduced. S. 1182, by repealing the Act's Section 41, would multiply rather than reduce compensation claims.

The Insurance Industry in Worker's Compensation

It is hardly necessary to remind anyone here that the American insurance lobby is a well-financed and superbly organized political instrument. If the merits of S. 1182 were to be determined simply by sheer weight of lobbyist numbers and printed material provided at these hearings, there would be no point in our even bothering to attend.

We have some basic observations to make, however, on present-day insurance coverage in worker's compensation. Anyone concerned with the overall costs of the Longshore Act must be interested not only in the benefits provided to injured workers but in the manner in which the charges for these benefits are set. We believe that costs under the Act can and should be reduced in many ports, and we believe that your Subcommittee could provide the leadership in this direction by launching a detailed investigation of just how compensation insurance works in the maritime industry.

Employers and their insurance carriers have been complaining for years that Longshore Act premiums have gone steadily and intolerably upward. The program has become so expensive, they claim, that fewer and fewer carriers are willing to provide coverage and many shippers are being forced to self-insure. It is true that premiums are significantly higher today than they were before the Act was amended in 1972. But an examination of the industry's own figures reveals that this increase occurred for the most part right after those amendments were enacted, as a natural result of the expanded jurisdiction and increased benefits that went into effect at that time.

More important: for all the maritime industry's clamor about skyrocketing costs since 1972, out of 189 Longshore post-amendment stevedore rates in 28 states for which we have figures, 96 (or 51 percent) have actually gone down. An additional 19 (or 10 percent) have risen less than 10 percent.

It is true that in several key ports premium rates have risen phenomenally, but this merely points up the utter artificiality of insurance compensation rate-setting. No two ports are alike, and safety hazards vary tremendously from harbor to harbor. But it is not--as the rates would imply--twice as dangerous to handle cargo in New York as it is in California, nor more than three times as dangerous in New Jersey as in Florida.

Nor do we mean to imply that many shippers are not being forced to pay unjustifiably high carrying charges. They certainly are, and this is reflected in all of the evidence which we have been able to assemble up to now.

For the benefit of anyone who believes, as the insurance industry proclaims, that Longshore coverage is generally unprofitable and that fewer and fewer carriers are willing to offer it, we cite the example of California. In this State, the same private carriers have been participating in Longshore for years, even though premiums started to go down in 1978, when the California state fund began to participate. This competition is increasing, even though California rates have continued to decline through 1980 and though many maritime employers on the West Coast have chosen to self-insure.

Carriers providing Longshore coverage in several other states have also increased. Testimony from the insurance industry's own representatives in last September's Senate oversight hearings indicated that coverage has become more readily available, for example, in Texas and Louisiana.

The wide divergence of premium levels, the fact that the administration of the Act varies noticeably from port to port, and the difficulties we ourselves have had in securing employer compliance, indicate that whatever problems exist result for the most part not from the Act itself but from other factors. Why do the premium levels vary so widely from state to state? What provisions in the Act--if any--are responsible for these variations? How have administrative problems and other factors independent of the Act affected its costs? Congress should not in fairness even consider taking the drastic step of cutting workers' compensation benefits until these questions are answered.

The key to all of this, we believe, is that among all the industrial nations of the world, only the United States, Sweden, Australia, and to some extent Germany allow their workers' compensation programs to be administered as profit-oriented businesses by private corporations. All the others have long since recognized that workers' compensation is a basic social right, not an optional luxury to be purchased in the market place, and they have made their governments responsible for these programs.

The Federal government has not only failed to follow this example, but through the McCarran-Ferguson Act of 1946, has left the insurance industry conspicuously free of federal regulation by exempting it from anti-trust action. Though agencies at the state level are nominally responsible for setting or approving manual rates for workers' compensation, the rates are really set by the industry through the National Council on Compensation Insurance or similar local bodies. As reported in the Journal of Commerce (3/9/81), the president of Wausau Insurance Co. recently told an audience:

"Three [state] commissioners have told me they .... are tired of approving rates when they do not know where they come from."

Moreover, as the National Association of Insurance Commissioners' Subcommittee on Competition observed in its recent report: "It is not uncommon for company executives to establish rate level targets without consideration of actuarial calculations. In many cases, even where actuarial calculations are prepared and presented for [state regulating] department review, they are prepared to support a predetermined rate increase."

The rate-setting system that exists has, in fact, combined the worst rather than the best features of control and competition: privately coordinated price-fixing takes place under the respectable veneer of state regulation, with the controls operating to maintain premiums at minimum levels rather than to keep them at reasonable maximums. This absence of real public control not only generates enormous profits but protects the least efficient of the supposedly competing companies. "The use of the industry wide data [in rate setting]," says the NAIC report, "provides a protective umbrella for less efficient insurers and renders strenuous cost containment by the more efficient companies less necessary than under a fully competitive system. In turn, this means a higher price to the consumer."

We have already cited the "higher price" of Longshore coverage which shippers are forced to pay in several ports. One component of this price lies in the overhead charges that are included in the premiums. The findings of many sources in recent years have clearly demonstrated that an inexcusably large portion of collected premiums in privately carried compensation programs goes not into benefits for injured workers but into reserve accounts, acquisition costs, and other administrative rake-offs. The accepted average overhead charge for private companies is 35 cents out of every premium dollar, and according to many estimates the average figure is significantly higher. According to the Social Security Bulletin, for example, in 1978 out of $17 billion paid by employers nationwide to purchase workers' compensation, $9.7 billion was paid out in benefits and $7.3 billion (43 percent) went to overhead costs.

These non-benefit expenses have resulted largely from insurance companies' policy of paying out as little compensation as possible. In workers' compensation this is well borne out by the high incidence of contested claims and the volume of premium dollars allotted to legal costs. Though the 1972 Longshore amendments, as mentioned, were intended to reduce court battles over compensation benefits, neither our employers nor their insurance carriers have ever shown any reluctance to drag out the settlement of claims through expensive litigation before administrative law judges and the Benefits Revenue Board. From 1978 to 1979, for example, the number of cases heard by Longshore administrative law judges jumped from 1800 to approximately 3100. This increase, former Assistant Secretary Elisburg noted, did not result from substantial legal issues being brought for resolution but from a heavy volume of cases involving attorney's fees, settlements under Section 8(i)(A), and second injuries under Section 8(f). On a national scale, figures compiled by the Department of Labor for its 1980 report on occupational diseases show that private carriers contest 11.9 percent of all claims, and 44.4 percent of permanent total disability and death claims.

The large portion of insurance premiums that does not go to the benefit of injured workers is not absorbed solely by overhead costs, however. It also finances the investment funds that make insurance companies the multimillion dollar empires they are. It has become clear in recent years that the actuarial standards private carriers use for their reserve accounts are so conservative as to be completely unrealistic. The concept of "actuarially sound," commonly applied in insurance, requires that a given fund already have collected all the money that could possibly be needed to pay all claims foreseeable or imaginable in the future. If the fund has not done so it is considered deficient, even though, practically speaking, it has more than enough revenue on hand to meet all of its claims.

The stringent application of this financial requirement to workers' compensation has resulted in an outrageously disproportionate accrual of compensation reserve funds--financed through disproportionately high premiums. Those reserve funds are enormous sources of investment profit, and their appearance on balance sheets as "losses"--which is to say inflated estimates of future losses--both disguises them and allows them tax-free status.

The predictable result: a 1979 Federal Insurance Administration study of the property/casualty industry's own figures found that the industry paid federal income taxes averaging only about 1 percent of its gross income and less than 8 percent of its gross profits--$44.4 billion--over the previous 20 years.

Even the Journal of Commerce--hardly an enemy of private insurers--complained in a recent editorial that "insurance accounting enjoys a bookkeeping language all its own," and that the property/casualty industry was misleading the public by claiming to have suffered a $3.04 billion underwriting loss in 1980 while in fact it made a $7.51 billion profit.

This helps to explain why seven out of ten leading workers' compensation insurers recently surveyed by the National Council on Compensation Insurance have predicted that their investment income will increase both this year and next, due to higher interest rates and to the fact that their reserves are increasing as a percentage of income. Workers' compensation in California, in fact, has become a financial bonanza for 259 private companies, with total premiums exceeding $3 billion last year, and, according to Barron's, higher intake is expected in the future. (As the vice president of a leading insurance firm stated in December last year: "Even when the [California workers' compensation] industry is not getting rate increases, it shows good underwriting earnings.")

One possible approach to dealing with these problems would be to take compensation insurance out of private hands. Along with most other industrialized countries, six states--Ohio, Nevada, North Dakota, Washington, West Virginia, and Wyoming--currently administer their own compensation programs, and others--including Oregon, New York, Pennsylvania, and Maine--may elect to do so in the near future. Other states maintain their own funds in competition with private carriers.

The experience of these states is highly instructive. In California, as mentioned earlier, the state fund's entry into Longshore coverage triggered a decline in premium costs. In states that have exclusive funds, similarly, premium costs for employers as a whole are spectacularly lower--and purchase higher benefits--than in other states. A 1979 study completed by the Minnesota Workers' Compensation Study Commission revealed, for example, that in 1978 Ohio, a major industrial state, spent an average of $1.72 per $100 of payroll in compensation premiums while Texas, which requires employers to insure through private carriers, spent $3.28 per $100 for inferior coverage.

In several of the states that have exclusive funds, overhead is so low that these funds not only charge lower premiums but pay out more in benefits to injured workers than they take in in premium charges. The Ohio state fund's investment earnings in 1978, for example, allowed $1.31 to be paid in benefits for each premium dollar collected. In Washington, the benefit amount is $1.05 per premium dollar. In each case overhead costs are so low that investment income more than covers them.

State funds also specialize in workers' compensation and occupational health and safety, while private carriers disperse their resources along many different lines. This can have a direct effect on the reduction of accidents and occupational diseases. In Washington, for example, the Department of Labor and Industries administering the State's compensation program works closely with the Division of Safety, providing it with six-week-old claims data and accident reports, region by region and industry by industry. (Most states have to rely on Bureau of Labor Statistics data that are much older and less detailed.) This data has helped the Division to zero in on many problem areas, lowering the rate of accidents and reducing compensation costs in many industries.

Oregon, a state within ILWU's jurisdiction, provides a vivid demonstration of the difference between the exclusive-fund approach and coverage by private carriers. Oregon had an exclusive fund until 1965, when it allowed private carriers into the market to compete with the fund. Since then, as shown by recent studies by the Oregon Journal and the Oregon Legislative Committee on Trade and Economic Development, premiums have risen 700 percent, rate competition has become practically nonexistent, medical costs have gone almost completely out of control, and about 53 cents of every premium dollar fails to reach injured workers or their families.

Of course, the exclusive public fund is not the only available alternative to uncontrolled private coverage. Both the Department of Justice and the

National Association of Insurance Commissioners have spoken in favor of increasing competition in the insurance industry either by repealing the McCarron-Ferguson exemption or by passing model state legislation. It might also be possible to regulate actuarial standards so as to bring them into the real world of health costs and low income.

The point is that there is general consensus outside the insurance industry that compensation insurance as it now functions is needlessly expensive and inefficient, and all avenues to correcting this problem need to be explored.

Conclusion

We have discussed these aspects of the insurance industry because we believe that they constitute much of the real source of the problems that exist in the Act and in other workers' compensation programs. Needless to say, the data we have cited here merely scratches the surface of the issue, and more investigation is required to give us a complete picture. We would ask you, the Department of Labor, and any other agencies you care to designate to conduct such an investigation for the benefit of all concerned.

We have explained why the provisions of S. 1182 would be totally unfair to longshoremen. But the costs of the Longshore Act can and should be lowered, and our purpose here has been to emphasize that this can be accomplished without condemning injured workers and their families to medical and economic deprivation. It is easy to look at a program and jump to the conclusion that if its costs are excessive, its benefits must be too. But your Subcommittee is responsible for balancing the needs of workers, employers and the public as you evaluate the programs that come within your jurisdiction, and we would urge you to obtain more information along the lines we have suggested before you take the drastic step of making major changes in an Act which for years has served as the model of its kind. Similarly, we urge you to take a closer look at health-and-safety conditions in the ports so that we can develop new and more effective rules and practices to minimize industrial diseases and accidents.

From this perspective we offer you our full support in your efforts to improve workers' compensation systems both for longshoremen and their employers.

INTERNATIONAL——WASHINGTON OFFICE——
LONGSHOREMEN'S & WAREHOUSEMEN'S
UNION
1133 - 15th Street N.W. Washington, D. C. 20005 • (202) 463-6265

JAMES R. HERMAN
President

RUDY RUBIO
Vice President

GEORGE MARTIN
Vice President

CURTIS McCLAIN
Secretary-Treasurer

7/10/81

James Powell, Editor
Senate Committee on Labor
and Human Resources
4230 Dirksen Building
Washington, DC 20510

Dear Mr. Powell,

Enclosed is the corrected transcript of our testimony on the Longshoremen's and Harbor Workers' Compensation Act before the Labor Subcommittee.

Enclosed also is the material on the Act we are submitting for the record. This material includes the transcript of a local television station (KCET)'s news story on employer noncompliance with the Act in the San Pedro area which was broadcast this spring; documents from particular cases that exemplify such noncompliance; and an analysis of S.1182 prepared by several concerned attorneys for the Los Angeles - Long Beach Harbor Coalition for the Act.

I also enclose some data on productivity and occupational injury from the Pacific Maritime Association's annual report for 1980, and an excerpt from OSHA's recently proposed rules for marine terminals.

I expect to receive some additional materials from the ILWU Longshore Division which I will forward to you immediately.

We believe that this material and the testimony we and other unions gave at the subcommittee hearings last month bear out our contention that the problems with the Act lie not in excessive benefits or abuse by workers but in employer violations, inadequate resources for DOL administration, inadequate management safety-and-health policies, and in the negative role played by private insurance carriers.

I am also enclosing for the record an exchange of correspondence between ILWU International President Jim Herman and Senator Nickles.

Please make this material available to the Chairman and other members of the Labor Subcommittee.

Sincerely,

Mike Lewis

Mike Lewis
Washington Representative

Enclosures

June 22, 1981

TO: LOS ANGELES-LONG BEACH HARBOR COALITION

Pursuant to your request, the undersigned lawyers met on numerous occasions to prepare the attached explanation of SB1182.

The Coalition may of course use these materials any way you see fit. However, we believe it would be especially appropriate if you ensured that the materials were distributed to every member that sits on the House and Senate Committees that will review the proposed legislation.

Additionally, although we prepared these materials for review by the legislators, we feel that they may be very helpful to the officers and members of your various unions and would urge that you make these materials available to them.

It has been our pleasure to join you in this fight. We look forward to continued work with you to defeat these proposals.

Sincerely,

Phil Brimble
PHILIP BRIMBLE

Vern Goldwater
VERNON GOLDWATER
of: Olney, Levy & Kaplan

Diane L. Middleton
DIANE L. MIDDLETON

RODNEY O. PRANIN

Charles Ryan
CHARLES C. RYAN

INTRODUCTION

The Los Angeles-Long Beach Harbor Coalition stands in strong opposition to current attempts to gut the Longshore and Harbor Workers Compensation Act. We have many bases for our opposition. First, the proposed Amendments totally ignore the goals and purposes of any workers compensation law. Traditionally, a workers compensation system is based on the concept that an injured employee voluntarily relinquishes the right to claim civil damages from his employer for pain, suffering, out of pocket costs of industrial injury, and even punitive damages where the employer has willfully or wantonly caused or contributed to the employee's injury. In exchange, the employee is to obtain a no fault system of scheduled disability payments from the employer through a simply-administered, speedy, and straight-forward system. The fundamental role of a workers compensation program is income substitution consistent with a man's past proven ability to earn wages. The reason that present systems focus on income substitution is because legislators took into account the "ripple effect" that would occur if primary family wage earners could not meet their existing obligations (provision of food, clothing and shelter for the family) without reference to public assistance. Thus, workers compensation systems were developed that would provide an incentive to the employer to pay compensation voluntarily and likewise an incentive to the employee to return to work as soon as medically feasible. The present Longshore and Harbor Workers Compensation Act meets these fundamental requirements.

Secondly, the maritime industry is unique. This law was originally passed in 1927 precisely because Congress recognized the necessity of not only uniformity in compensation but also special provisions due to the extreme danger in the longshore and shipbuilding industry. According to the 1979 Bureau of Labor statistics, the injury incident rate for the marine cargo handling industry is twice the average rate for industries in the private sector, while the rate of severe injuries is seven times as great.

These industries place enormous physical demands on the worker. The average longshoreman must climb up and down steep ships' ladders eight or nine times per work day. Work on containerized vessels often requires balancing forty or fifty pounds of lashing equipment sixty feet above the waterline. Likewise, shipyard workers are exposed to notoriously filthy, noisy environments requiring them not only to work onboard vessels but almost always to work in extremely confined spaces. Both of these industries expose workers to the hazards of performing their jobs in close proximity to many types of moving equipment and machinery. The worker places himself in this situation knowing that he faces an increased injury rate. Under existing law, he works with the assurance that he will not be forced into bankruptcy should an injury occur.

Thirdly, the sponsors of SB1182 state that the main reason they want to amend the present law is to eliminate numerous "fraudulent" claims and the involvement of recognized crime with the Act". They make reference to investigations of the International Longshoremen's Association in the East and Gulf Coast Ports. We consider this to be an unfounded attack on longshore workers in other parts of the country and shipyard workers everywhere. Congress cannot penalize all shipyard workers and Hawaiian and West Coast longshoremen because of an isolated incident where corruption may or may not be a fact. We are aware of no such "investigations", for instance, in the Los Angeles-Long Beach Ports revealing either fraudulent claims or criminal involvement with the Act. At any rate, the present law already provides criminal penalties for anyone who fraudulently obtains benefits (§31).

Finally, Congress is apparently forgetting the bargain inherent in the 1972 Amendments which were sponsored and supported by the employers. The ship owners and employers realized a tremendous reduction in their costs related to employee injuries through the elimination of civil lawsuits. At the same time, due to mechanization in the longshore and shipbuilding industries the numbers of workers have steadily declined while productivity and employer profits have steadily increased. Under the present law, it is still quite profitable for insurance companies to underwrite maritime risks. LIkewise, the shippers and stevedores are enjoying phenomenal profits as tonnage and productivity continue to rise in relation to man hours worked. There is no evidence that the present law is not meeting the needs of all parties affected.

As is demonstrated by the following analysis which describes each of the major provisions of the proposed Amendments, the balance previously struck by the representatives of labor, industry and the insurance carriers would be radically altered. Although the proposed Amendments propose to strike a more equitable balance between these interests, in fact, they shift the burden for providing for disabled workers from the industry which occasioned these injuries to the taxpayers of this nation.

MEDICAL BENEFITS AND SERVICES; PROPOSED SECTION 5

The proposed 1981 Amendments restructure the existing sections of the Act dealing with medical care and benefits to injured workers in a completely one-sided and unfair fashion. In the original Act, and in the 1972 Amendments, a careful and conscientious effort was made by all parties to create provisions for medical care that would best assure the restoration as far as possible of the good health and hence productive capability of the injured worker.

The 1981 Amendments introduce into this sensitive area a systematic bias, by granting all control over the course of medical treatment to the employer while giving none to the injured employee. This bias is manifested in the following key aspects of the medical benefits section of the proposed Amendments.

First, the employee completely loses the right to select his own treating physician. This right was established in the original Act. Senator Nickles incorrectly refers to this as a "free and unsupervised choice", totally ignoring the provisions introduced by the 1972 Amendments concerning supervision by the Department of Labor. The proposed 1981 Amendments place the employee completely in the hands of physicians selected by the company, by totally limiting the injured worker's choice of treating doctor to a list of practitioners handpicked and proposed to the Department of Labor by the employers. One wonders how many congressmen would consent to be operated on only by doctors chosen by their opponents in their last election!

Injured employees are already all too familiar with the "company doctor" whose continued employment is dependent upon the reduction of company medical costs and not upon the quality of medical care rendered. Many of the worst abuses under the existing Act occur on a routine basis because doctors selected by the employer intervene in the course of medical treatment being given an injured employee by his chosen doctor.

Take the following example. While on disability and receiving medical care, a worker is required to report to a doctor selected by the employer. Typically, and usually despite a different assessment from the treating physician who has had the patient under observation for some time, the doctor selected by the employer pronounces the worker able to return to work, on the basis of one examination. The company then suspends further benefits and controverts the need for extended medical care, despite the fact that the present procedures require referral to an independent and impartial medical evaluator. Injured workers then face the prospect of either continued care from their own doctor without receiving compensation benefits, until the case can be resolved, by trial if necessary; or returning to work before they are able properly to do so. In the first case, injured workers suffer increasing tension and aggravation as their bills mount and they watch their hard earned savings and resources dwindle away. In the second case, the chances of receiving a disabling injury by aggravation of the existing condition is greatly increased. Either "option" is especially difficult for those workers with families who receive minimum benefits; they can be literally "starved" back to work in short order.

This scenario is not at all uncommon. The employer follows this procedure in most cases as a matter of course. Under such circumstances, the injured employee sees the company doctor for what he is: an adversary. Rather than attempting to correct such abuses, the proposed Amendments turn them into law.

Second, under the proposed Amendments, only the employer has the right to request a change of treating doctors. The existing provision allowing the employee to make such a change, through procedures supervised by the Department of Labor, is deleted in its entirety.

Consider a situation where even a treating doctor from the employer's handpicked list believes that a worker's injuries can best be treated by cautious and conservative care over an extended period of time. The employer disagrees, considering lengthy disability benefits with the implication of possible permanent disability too expensive. Under the proposed Amendments, the employer can request a change to a doctor it hopes will be more amenable. On the other hand, an employee in continuing severe and disabling pain who is concerned about the diagnosis of his company doctor that he can return to work without restrictions can do nothing under the proposed Amendments. There is no longer any provision for the employee to request the Department of Labor to authorize a change of treating physicians.

Third, the proposed Amendments create an unwieldy and potentially dangerous procedure for referral of the injured worker by a treating doctor to a specialist. The company is allowed to inject its point of view in to the doctor's exercise of judgement, even though the company has already preselected and approved that doctor. Under the proposed Amendments, a treating doctor can refer an injured worker to a specialist only after providing, among other things, a written statement of reasons for such a referral to the company, as well as the Deputy Commissioner.

Many injuries to longshore and harbor workers involve numerous parts of the body. For example, a longshoreman is hurt by a falling box of cargo, which causes serious head, neck and back injuries. He is seen by a company-approved orthopedist who, concerned about the employees complaints of severe and disabling headaches, wishes to refer the case to a close-by neurologist. Referral is delayed pending preparation, transportation, forwarding, receipt, review and response to a medical report! Such a cumbersome and time consuming procedure can be of no benefit to the injured worker.

The situation is made worse if, following the injury referred to above, the longshoreman begins to complain of severe pain in his teeth. The same company-approved treating physician thinks he should see a dentist. The company, after the same time-consuming procedures, disagrees and refuses to authorize the expense, thereby effectively halting treatment. The injured employee has no means to insist upon the referral; he will have to go to an unauthorized dentist and pay his own bills. Now we see that while this procedure may be of no benefit to the injured employee, it is of great service to a cost-conscious company!

And woe to the worker who is so foolish as to be injured in such a severe fashion as to require hospitalization! The proposed Amendments seem to require a veritable blizzard of paperwork before referral to radiologists, cardiologists, surgeons, or whoever else may be necessary!

In all of these cases, the injured worker remains without recourse, a helpless marionette dangling at the end of strings pulled by the self-interested employer.

Fourth, under the proposed Amendments, only the employer may request the reolution of medical disputes by referral of the case to an independent medical examiner. Under the existing Act, a request for such an examination is one of the most important ways for an employee to correct abuses by company doctors; for example, to determine if a release to work is proper, or to decide if referrals by the chosen doctor were appropriate. Under the proposed Amendments, this procedure is entirely done away with. The use of independent medical examiners to resolve medical questions is for all practical purposes eliminated. While one wonders what disputes will really arise between the company and their handpicked doctors, the employee who is, for example, dissatisfied with a release to work without restrictions, no longer has any recourse.

If we stretch our imagination and conceive a case where a treating doctor gets out of line, by company standards, by finding a worker disabled, or subject to extreme restrictions, then the employer can select an independent medical examiner. Again, the employee has absolutely no choice or input in this matter. Company favoritism will have a clear field, and it takes little thought to see that only the most conservative practitioners will be utilized by the company for such purposes.

The real point to the restricted and company-controlled independent medical examination is to allow the employer, in cases where the treating doctor has given an employee too high a disability rating for the company's tastes, to send the injured person to a second, more conservative doctor; and to help an employer to apportion injuries between that for which the examination is requested and any pre-existing problems, thereby reducing the employer's liability for permanent disability benefits.

Only if an employer files for an independent medical examination and also requests a medical report from that doctor, can the employee who disagrees with the result request a reexamination by a doctor selected by the Deputy Commissioner. The proposed Amendments leave open the possibility that the employee will have to pay the cost of this re-examination himself.

The above examples are merely the obvious instances of unfairness and potential abuse, when procedures are so completely skewed to one side, the employers'. Such a system can hardly be expected to achieve the basic purpose of restoring an injured worker's health. But then, of course, that is hardly the purpose of the proposed Amendments.

JURISDICTION

The proposed Amendments significantly alter the number and types of workers covered by the Act. The proposed bill would remove from coverage under the Act the following:

1. Substantial numbers of longshore and harbor workers who directly participate in the movement of seaborne cargo before it is loaded or after it is discharged from the vessel;
2. Substantial numbers of workers directly engaged in the highly integrated work activity involved in shipbuilding, shipbreaking and ship repair; and,
3. Other workers whose building and repair of essential harbor facilities allows shipbuilding and longshore activities to occur and continue.

Contrary to the allegation by the Senate Bill's sponsor that the existing Act has ".....no clear jurisdictional lines...", the jurisdiction or coverage of the Act is presently well defined by a substantial body of case law. The United States Supreme Court has issued definitive guidelines for interpreting questions of who is covered by the Act. The proposed amendments not only fail to improve the alleged problems they seek to correct, they actually compound them. The certain results will be extensive litigation of the ambiguous jurisdictional provisions.

The Supreme Court has recognized 1/ that Congress intended, through the 1972 Amendments, to provide coverage to longshore workers permanently displaced from jobs aboard vessels due to cargo containerization and other modern innovations. The Court recognized that maritime cargo handling is a highly integrated process.

In its second decision 2/, the Supreme Court limited the Act's coverage to those employment activities which constitute essential intermediate steps in moving cargo between ships and land transportation.

Section 2(3) of the proposed Amendments would substitute a "moment of injury test" to determine if the injured worker was covered by the Act. The proposed Amendments would require that a longshoreman be engaged in loading or unloading of cargo between the vessel and the "point of rest" to be covered. The following examples demonstrate the illogical and inequitable consequences of such a test.

1/ Northeast Marine Terminal Co., Inc. vs. Caputo, 432 U.S. 249 (1/19/77)
2/ P. C. Pfeiffer Co., Inc. vs. Ford, 444 U.S. 69 (1979)

LONGSHOREMEN

EXAMPLE 1: A longshoreman steadily employed by a stevedore company assists in the unloading of cargo from a ship for two days. After the ship departs, the employer assigns the longshoreman to transport the same cargo that he temporarily placed upon the dock to an area within the employer's yard, where it can be picked up by the consignee. If injured while transferring the cargo he previously unloaded, this longshoreman is not covered under the proposed Amendments.

EXAMPLE 2: A longshoreman who has worked for many years as a "holdman" working aboard and inside ships takes a single day's employment unloading cargo assigned to multiple consignees which was placed in a single cargo container for overseas shipment. Even though the cargo cannot be picked up by any truckers until it has been sorted and segregated at the stevedore's "container freight station", and although the cargo in the container may be dangerous to handle, due to having shifted during its voyage at sea, the longshoreman is not covered under the proposed Amendments if injured, as the container came to rest for several hours in an area a few hundred yards from the ship where it was temporarily placed prior to movement to the container freight station.

EXAMPLE 3: Perishable cargo stored in refrigerated containers is taken directly from the ship to longshoremen who unload it at the stevedore's container freight station, so that waiting truckers can load it in their trucks for immediate delivery. If injured, the longshoreman is covered, as the cargo has not reached the first "point of rest" after leaving the ship. If the ship unloads more perishable cargo than can be immediately handled at the container freight station, the remaining containers are hooked up to electrical outlets outside the container freight station for several hours before being unloaded at the container freight station. Although the cargo may be identical to that which came directly from the ship and arrived aboard the same ship at nearly the identical time, the longshoreman who handles both of these cargos will not be covered under the proposed Amendments; although he performs exactly the same job duties in unloading these containers. The momentary delay in forwarding the cargo from the ship to him changes his coverage under the proposed Amendments.

SHIPBUILDERS, SHIP REPAIRMEN AND SHIPBREAKERS

Proposed Amendments require that these workers be performing work on navigable waters or in a drydock when their injuries occur. The following examples demonstrate the proposed Amendment's potential:

EXAMPLE 1: A welder is regularly assigned to weld aboard ships under construction. Whenever extra welders are required to weld on the subassemblies which are being fabricated on the dock and hoisted aboard the vessel, he is requested to perform that job. If he is injured while working on the dock, he is not covered under the proposed Amendments.

EXAMPLE 2: A shipyard crane driver operates a crane on a pier which parallels the ship under construction. Since the crane operator is not upon the navigable waters or upon a floating drydock, he does not qualify for coverage under the proposed Amendments, if injured.

EXAMPLE 3: A ship repairman goes aboard a vessel, removes malfunctioning machinery and takes it to the employer's shop area for repair. He intends to reinstall the machinery, when it is repaired. If he is injured while working in the shop, he is not covered under the proposed Amendments.

EXAMPLE 4: A burner precision cuts portions of a ship's hull from steel plate in an area immediately adjacent to the drydock where a ship is under construction. A rigger assists the crane which picks up the plate and transports it to a drydock where the same rigger attaches it to a different crane so that it can be placed on the vessel's hull. If the rigger is hurt before he reaches the drydock, he is not covered under the proposed Amendments. He passes in and out of coverage under the proposed Act dozens of times everyday while performing his job.

EXAMPLE 5: Ship's painters are assigned to paint the hull of a vessel tied up at the shipyard dock. Those painters who perform their job on the area below the ship's rail from scaffolds suspended from the ship's rail are covered under the proposed Amendments. If those painters then complete painting of the lower portions of the ship's hull by working off the dock or from staging attached to the dock, they are not covered under the proposed Amendments.

HARBOR WORKERS

The proposed Amendments require a harbor worker be engaged in the performance of service on or for a vessel while such person is on navigable waters, but not covered by a State Workers' Compensation Law. The proposed Amendments would occasion the following:

> EXAMPLE 1: A dredgerman assigned to installing and servicing piping used to remove material dredged from a ship channel is injured on land while rigging up piping to be attached to the floating pipe sections he has already attached to the dredge. His injury is not compensable under the proposed Act.
>
> EXAMPLE 2: A dock builder assigned to a floating derrick used to repair a commercial dock is injured while working on a portion of the repaired dock while the use of the floating derrick is temporarily suspended, due to a commercial vessel being berthed at the dock in need of repairs. The worker's injuries would not be covered under the new Amendments.

The foregoing examples should demonstrate reliance on a "moment of injury test" deprives substantial numbers of workers intimately involved in the movement of seaborne cargo, shipbuilding activities and harbor work from coverage under the Act. The present Act's reliance upon a functional or occupational test, subject to geographical limitations, provides a better reasoned approach; in that it recognizes the high risk of injury in the maritime trades of longshoring, shipbuilding and repairing, and harbor facilities constructing does not end at the water's edge or at the first "point of rest". These industries involve the use of heavy equipment in highly congested areas and require the integration of manpower into what are aptly described as heavy work activities. Due to the nature of work involved, injury rates far exceed those in other industries. Coverage under the Act has afforded workers injured within these industries the measure of economic protection which their periodic unemployment, due to injury, requires. In that this increased incidence of injury is spread throughout all phases of the aforementioned maritime trades, all workers engaged in these hazardous activities should be afforded the special protection given by the Act's compensation system.

The vast body of decisional law, which has defined the present Act, has established that coverage under the Act is limited to those workers who can meet the "status" and "situs" requirements of existing Sections 2(3) and 3(a). "Status" is satisfied when the employee is able to establish that:

1. A significant portion of his employment duties are essential to the movement of seaborne cargo to the point where it is transferred to land transportation

systems;

2. His job duties form an essential link in the chain of integrated work activities by his employer, which culminate in shipbuilding or repair; or,

3. A significant portion of his employment duties are essential to the construction or repair of the marine facilities which are directly related to:

   (a) Loading and unloading of seaborne cargo;

   (b) Navigation of commercial vessels; and,

   (c) Marine shipbuilding facilities.

By utilizing this "occupational test", the circumstance of coverage under the Act does not depend on the exact job duties at the time of injury or the specific location where the injury occurred, to control who is covered under the Act. It is submitted that all of the anomalous results cited in the foregoing examples are avoided by the present "functional test". The present test prevents a worker from "walking in and out of coverage" within his regular work activities by reason by his specific job assignment or job location.

The "situs test" incorporated in the present Act limits coverage to workers injured either on the navigable waters or in contiguous shoreside "terminal areas". Almost without exception, all injuries presently covered under the Act occur either on vessels or on the immediately adjacent docks, piers, wharfs, staging areas or shipyards. Proponents of the proposed Amendments would ignore that the work historically performed aboard vessels has been removed from that location to immediately adjacent shoreside facilities. Shipbuilding now involves an increasing amount of assembling units fabricated ashore at the employer's shipyard. Cargo is presently hand sorted for delivery to various consignees not in the hold of the vessels or on the dock, but a short distance away in "container freight stations". The injury to a longshoreman's foot, occasioned by a falling stack of crates inside a container whose cargo has been shifted during its voyage at sea, is no different from one which would have occurred had he sorted the same disarranged cargo in the hold of the vessel. The shipfitter injured while plying his trade on a module on his employer's assembly apron utilizes the same work methods and faces the same hazards, as if he performed his job on a vessel. The "situs test" limits coverage under the Act to those areas that have a very high concentration of resources (i.e., cargo, materials, equipment and workers). This area has traditionally been the location of an excessively high number of injuries occasioned by the congestion of equipment and work activities in the areas immediately adjacent to the vessels.

The jurisdictional requirements of the present Act take into account the historical perspective of the basic industries involved, their transitional development and their present status. They form a flexible network of requirements that can be adapted to further changes in those industries. The jursidictional requirements of the present Act should not be deleted or modified.

COMPENSATION FOR PERMANENTLY DISABLING INJURIES

After an injured worker's injury has reached maximum medical improvement, the treating physician may determine that sufficient permanent damage has occurred to permanently reduce his functional capabilities and/or previous work capabilities. Under the present Act, workers so afflicted are compensated for this reduction in a manner which encourages them to return to employment in their most productive capacity.

To understand the changes proposed in the Amendments, the presently existing system of permanent disability compensation which fosters return of injured workers to their most productive capacity must be described. The present Act divides such compensation benefits into the categories which follow:

Permanent Partial Disability

Under the present Act, if the worker has sufficient residual capacity following an injury to allow him to return to some form of gainful employment, he is only partially compensated for the multitude of effects occasioned by that permanently-disabling injury. He is not compensated for:

1. The full amount of wages lost;
2. The pain and suffering he continues to endure;
3. The loss of contributions to Social Security, union retirement plans, or other benefit programs, occasioned by the reduction in the amount of hours he works or reduced amounts he earns at a less remunerative occupation, following the injury;
4. Out-of-pocket expenses he incurs in hiring persons to perform services to his household that he previously performed; and
5. The earnings lost if his injuries cause him to forego post-retirement employment.

Unscheduled Injury (Wage-Loss) Claims

Under the present Act, if the permanently disabling injury involved the worker's spine, brain, heart, lungs, vascular or nervous system or internal organs, the worker must establish the precise amount that his wage-earning capacity has been reduced. Should conditions which influence the initial evaluation of his wage-loss change at some subsequent time, all parties are afforded opportunity to review and modify the initial wage-loss award. The worker receives only two-thirds of the amount he is losing in weekly payments, and this amount is not increased as inflation decreases the value of the fixed-dollar payment amounts. The present Act affords the employer the opportunity to demonstrate the injured worker's highest paying re-employment capacity (consistent with his residual capacities) and to compensate him only for two-thirds of the wage loss which is established.

EXAMPLE 1:

A longshoreman earning $500.00 per week suffers an injury to his back which involves damage to an intervertebral disc. After surgery and recuperation, his treating physician advises vocational rehabilitation, as heavy longshoring work activities now pose a serious threat to his damaged spine. Following job training, the injured worker is employed as an electronic technician and earns $200.00 per week from this employment. The worker will initially receive a compensation payment of $200.00 per week (two-thirds of his $300.00 per week wage loss). Two years later, the worker's skills have significantly increased so that he earns $600.00 per week. The employer seeks and obtains modification of the original payment amount and is relieved of any further compensation payment.

EXAMPLE 2:

The same longshoreman as in the previous example does not obtain significant relief from the surgical procedures employed. He attempts the electronic technician training program, but the required physical activities are beyond his pain tolerance. He accepts employment as a limited-duty parking lot attendant (only working as a cashier). He initially earns $200.00 per week for full-time employment and receives an additional $200.00 per week in compensation payments (two-thirds of his $300.00 per week wage loss). He later requires further surgery and develops arthritis in his spine. All physicians now agree that he is limited to working only 20 hours per week so that his earnings drop to $100.00 per week. The worker seeks modification of his previous award due to this change in circumstances and his weekly compensation payment is raised to $266.67 (two-thirds of his $400.00 per week wage loss).

The proposed Amendments would radically alter this compensation formula by:

1. Limiting the period wherein payments could continue to a maximum of 5 years (312 weeks) and the period of modification to 6 years, even though the injured worker's

demonstrated earning loss could continue for many years following that payment, and the need for an equitable modification could arise more than one year after compensation payment was terminated.

2. Reducing the total weekly compensation payment amounts to the injured worker by amounts he receives from employee retirement plans, Social Security disability benefits, or unemployment benefits.

3. Limiting any payment made to two-thirds of the difference between actual dollar amounts earned pre and post injury--thereby phasing out compensation payments for lost earning capacity as subsequent wage increases caused by inflation narrow the difference in dollar amounts earned before and after the injury.

4. Cancelling any payment of permanent disability compensation for injury to the major body systems, if any injury to an extremity, eyes or ears, was concurrently involved -- even though the injury to these parts may have been minor and that compensation amounts payable may be minuscule.

5. Denying any compensation payment to a person who works past a retirement age at which most workers in his industry retire.

EXAMPLE 3:

1. A longshoreman working at a daily rate of $100.00 per day has an average weekly wage of $500.00 generated from working 5 days per week in the holds of vessels. He incurs a back injury, requires surgery and is off work one year. He returns to longshore work, but is precluded from climbing the ladders into the ships' holds. He returns to work driving equipment on the dock where only 4 days work per week is available. Under present law he is declared 20% partially disabled due to losing one-fifth of his earning capacity and receives $66.67 weekly compensation payment (two-thirds of his $100.00 weekly wage loss).

   Under the proposed Amendments, each year as this worker's daily rate increases from industry-wide wage raises, his earnings loss would have to be recomputed and a new compensation order issued, because his earnings loss is measured only in terms of the actual wages (dollar amounts) he receives after the injury (which is compared with his earnings at the time he was injured). Consider the compensation paid to the same worker in this example under the proposed Amendments. When he returns to work one year after his injury, he earns $110.00 per day as a dock man (due to an industry-wide wage raise) so initially he has only a $60.00 per week wage loss ($500.00 less $440.00). He receives compensation of $40.00 per week (two-thirds of $60.00) during the first year. During the second year, his day rate raises to $120.00 per day, so his earnings loss is $20.00 per week ($500.00 minus $480.00). The carrier seeks and obtains modification of the existing order and the compensation payment is reduced to $13.33 per week (two-thirds of $20.00). When the worker receives his next annual wage raise (to $130.00) the carrier will petition to stop all further compensation payments. The worker's right to seek any modification of his compensation claim will end one year after the date the employer terminates payment.

The example demonstrates that although the injury has permanently limited the worker's earning ability by 20% (he would otherwise earn $650.00 for five days work) the proposed Amendments phase out and terminate any payment for this permanent loss due to a measurement method which uses dollar amounts to determine his permanent earnings loss.

The proposed Amendments:

1. Remove the incentives existing in the present Act which encourage the worker to become re-employed and seek increased post-injury earnings as this course of action under the proposed Amendments automatically reduces the compensation payments the worker receives.

2. Encourages workers to retire earlier than they might otherwise do, as they receive neither compensation for the temporary or permanent disabling effects of any injury incurred if they work past the "normal industry retirement age".

Scheduled Injury Claims:

Permanent loss of use of the extremities, eyes, or ears, is presently compensated under a system of fixed-number of weekly benefit payments for the particular member/organ injured. Partial loss of use is compensated on a pro-rata basis for the percentage of loss of use.

EXAMPLE 4:

A longshoreman crane driver earning $600.00 per week incurs a 20% loss of vision in one eye receives 20% of the number of weeks of compensation payable with a total loss of use of that organ (as provided in the "schedule" - Section 8(c)(5) of the present Act). The longshoreman would receive 32 weeks of payments (20% of the 160 week "scheduled" amount) at his compensation rate of $400.00 per week (two-thirds of

$600.00. He will receive weekly payment amounts of $400.00 per week until they total $12,800.00 which will be the total compensation he receives for this injury. This amount may be grossly inadequate, if the injury prevents the longshoreman from returning to work as a crane operator and causes him to be relegated to the few types of longshore work where unimpaired eyesight is not required. If his earnings drop to $350.00 per week in performing this less available alternate work, his wage loss for the first year following the injury would be $13,000.00 ($600.00 minus $350.00 times 52 weeks). Although the wage loss will continue indefinitely, the worker will have received all the compensation the schedule affords him.

The Supreme Court has described the inequities that this system engenders as follows:

> ". . . It is true, however, that requiring resort to the schedule may produce certain incongruous results . . . the schedule may seriously undercompensate some employees like respondent Cross. The result seems particularly unfair when his case is compared with an employee who suffers an equivalent impairment of earning capacity. . . ."1/

The proposed Amendments would compound the inequities generated by the use of "scheduled" awards of permanent disability benefits by:

1. Substantially reducing the weekly compensation amount paid (from its present two-thirds of the worker's average weekly wage to 80 percent of the worker's "spendable income").
2. Placing all injuries to the spine, except those involving ruptured or protruding disks, under the schedule.

The inclusion of the spine under the "schedule" is particularly inequitable as injuries to this portion of the body most regularly cause changes in work capabilities that are directly reflected in changed earning capabilities. Usually those changes involve some permanent dimunition of earning ability. The proposed Amendment would limit compensation payment to a maximum 6 year term, even though the effect on the disabled worker could extend far past that limited period.

1/

Potomac Electric Power Company v. Director, Office of Workers' Compensation Programs, _____U.S._____, *revg*. 606 F.2d 1324 (D. C. Cir. 1979).

The proposed provisions which pertain to permanent disability compensation, as a whole, significantly reduce amounts paid directly to the disabled worker and would thereby shift the burden of his injuries to governmental social programs which would enable him and his dependents to meet their living costs. The reduction in the amount of spendable income which the disabled worker and his family could infuse into their local economy would have an adverse effect on that economic unit. A reduction of income flowing from the productive efforts of the family's former "breadwinner" can be anticipated to sow the seeds of disruption in family life, due to the economic deprivation which the family unit will experience. The dependents' loss of respect for the productive efforts of the disabled worker, which ultimately prove unproductive to the family unit following the industrial injury will have social consequences. The effects of this portion of the compensation system extend far past the insurance carrier's ledger sheets.

TEMPORARY TOTAL DISABILITY: KEY TO AN INJURED WORKER'S FINANCIAL SURVIVAL

There is no more important provision in any workers compensation law than temporary disability benefits paid to an injured worker while he is undergoing treatment and rehabilitation to overcome the effects of an on-the-job injury. Because longshoremen, harbor workers and shipyard employees are not entitled to wage or salary continuation while off of work for an industrial injury, the first day missed under doctor's orders represents a direct pecuniary loss to the employee. His wage stops, yet the costs of everyday living continues.

The existing Longshoremen's Act provides simply that during the period of temporary total disability, an injured worker continues to receive disability payments at the rate of 66-2/3% of his average weekly wages at the time of injury. The proposed Amendments would make substantial changes in the program. Each and every one of these proposals raises a spectre of increased administrative costs, increased complexity, increased bureaucratic involvement, and decreased benefits for the purported beneficiaries of the Act, the injured longshoreman and his family.

As to the rate of compensation, the proposed Amendments clearly do not take into account the incentive a worker now has for returning to work as soon as possible. Average weekly wage is presently determined by looking at the wages earned in the 52 weeks preceding injury. The worker then receives two-thirds of that amount. Thus, the worker is already at a financial disadvantage because he is receiving benefits on two-thirds of what he earned in the past while his co-workers still on the job are getting the benefits of contract increases, cost of living increases, etc. With inflation averaging 12 to 15% a year, the worker is sinking deeper into debt and his standard of living is steadily being cut back with every week he stays off the job as his earnings fail to keep up with the increased costs of food, clothing, etc. The proposed Amendments intensifies these harsh effects because they seek decrease in the weekly compensation payable during doctor's care, from 66-2/3% of average weekly wage to "80% of the employee's spendable earnings". The actual effect of this will be to "starve the injured worker" into a premature return to work, as the following shows:

> EXAMPLE 1: Under existing 1981 income tax withholding schedules, a married longshoreman residing in California, claiming two dependent children, earning $500.00 average weekly wage, would have $129.95 deducted from his weekly paycheck for federal and California taxes, for a weekly take-home of $370.05. Under the present Act, in the event of industrial injury, this injured worker would receive temporary disability benefits of 66-2/3% of his $500.00 average weekly wage, or $333.00 weekly. Although this represents a weekly loss of spendable income of $36.72, (or 10% of the employee's pre-injury spendable income) the employee most likely will be able to adjust his expenditures to survive the injury. Under the proposed Amendments how-

> ever, the same worker, under the same circumstances, would receive only 80% of his pre-injury spendable income as weekly compensation, or $296.04 a week. He will be compensated at $74.01 below his pre-injury spendable income, a monthly loss of $320.46 below his pre-injury spendable income. Very few working class families will be financially able to absorb a sudden out of pocket loss of $320.46 monthly and remain financially solvent. In the event of lengthy convalescence, the worker will inevitably be forced into bankruptcy.

Equally serious flaws are slightly less obvious. Under the proposed Amendments, "spendable earnings of the employee" are defined to be the average weekly wage of the injured worker "reduced by an amount required to be withheld from such wage under federal and state tax laws" and based upon the withholding schedules in effect "for the taxable year in which such payments are made without regard to any deduction or credit other than for personal exemptions". The procedural morass this would create is obvious:

> EXAMPLE 2: Longshoreman James Smith, a bachelor, suffers a compensable injury in January, 1982. The employer begins making temporary total disability payments based upon a single tax deduction. While still on disability in February, 1982, Mr. Jones is married. In November, 1982, his first child is born. For purposes of federal and state income tax laws, therefore, Mr. Jones for the entire tax year of 1982 is entitled to file as a married taxpayer, with three (3) deductions. Does that mean the employer, at the close of the 1981 tax year, owes Mr. Smith a huge, past due, lump sum payment of temporary total disability to compensate him for the difference between weekly payments made at the single taxpayer/one deduction rate, and payments at the married taxpayer/three deduction rate? Under the proposed Amendments, that would be the effect of Mr. Smith's marriage and the birth of his child.

> EXAMPLE 3: Harbor worker Ken Roberts is married with six (6) children. He also is injured in January, 1982 and at that time, the employer begins temporary total disability based upon a married taxpayer with 8 deductions. Unfortunately, the stress of Mr. Robert's injury causes problems with the marriage and in November, 1982, Mrs. Roberts obtains a divorce and remarries. Under the federal and tax state laws, therefore, Mr. Roberts is considered a single taxpayer for the entire tax year. At the close of the tax year, does Mr. Roberts owe the employer a substantial refund of a claimed overpayment of disability benefits, measured by the differ-

> ence in rates between a married taxpayer with 8 exemptions, and single taxpayer perhaps with only one exemption? This is precisely the result, without any fault on the part of Mr. Roberts.

The above examples demonstrate a fundamental problem with the proposed Amendments: the compensation rate "floats" for a single injury depending upon ever-changing factors such as marriage, divorce and children in the household, etc. Under present law, the compensation rate is fixed as of the date of injury.

Yet perhaps the most insidious of all the proposed Amendments, strikes directly at older maritime workers just at a time when the administration is making proposals designed to keep aging workers in the job market.

Under the existing Act, no distinction is made for disability purposes based upon the age of the injured maritime worker. Whether young, middle aged, or elderly at the moment of his injury, his compensation rights are determined by precisely the same principles. The proposed Amendments would change this even-handed approach, terminating the right of an elderly longshoreman to receive benefits "...after the employee attains the retirement age prevailing in the industry and geographical region within which the employee was employed at the time of the injury."

Amazingly, however, nothing whatsoever is said about the availability of alternative sources of income to the aged, injured maritime worker. The proposal provides the employer with the right to refuse compensation benefits altogether based purely upon age and even if the employer admits there are no alternate sources of income available to the aged, injured worker.

> EXAMPLE 4: Walter Harrison, a shipyard worker in the Southern United States, is employed at a non-union shipyard having no pension or retirement program, other than Social Security. At age 62, Mr. Harrison suffers a serious back injury requiring surgery. The employer determines that the "customary retirement age" for shipyard workers in unionized shipyards in the South is age 62, and notifies Mr. Harrison that no disability benefits will be paid. Mr. Harrison immediately applies for Social Security but there is a one (1) year waiting period for Social Security benefits. Until benefits are awarded, if ever, Mr. Harrison has no source of income whatsoever. After a life of hard work, he will be forced to file for Welfare or public assistance to meet some of the costs of living, and if Mr. Harrison owns property, or has savings, he will be forced to exhaust them before qualifying even for this minimum level of public assistance. For all practical purposes, Mr. Harrison's retirement years are destroyed, and because Mr. Harrison had

> the bad fortune to be injured at age 62, the employer pays not a single dime of compensation or assistance to him.

In the example just cited, what happens to an employer if Mr. Harrison should prosecute a claim under the proposed Amendments, and should prove that the employer wrongly denied him benefits; for example, because the prevailing retirement age in Southern shipyards in fact is 65, not 62? Nothing; there is not a single penalty imposed upon the employer whatsoever, except delayed payment of the very compensation benefits which should have been paid to Mr. Harrison years earlier, before he was forced into bankruptcy. Under the proposed amendments, all penalties for denying benefits are removed no matter how wrongful, unjustified, or blatantly vexatious that denial might be.

PERMANENT PARTIAL DISABILITY: COMPENSATION FOR INDUSTRIAL LOSS OF HEARING.

In common with many heavy-industry workers, longshoremen and harbor workers are exposed to excessive levels of industrial noise for extended periods of time. It is now undisputed medically, that industrial noise exposure is a leading cause of hearing loss in the United States. Also medically undisputed is the etiology of industrial hearing loss: rarely does it occur as a result of a single traumatic event (such as an explosion); far more commonly, it occurs slowly and cumulatively over a period of many years, increasing in severity in direct proportion to the levels of noise exposure, and to the time during which exposure occurs. As often as not, serious damage is done long before the affected worker realizes the problem exists, so gradual and progressive is onset of the disease.

Under the present Act, industrial hearing loss is treated as a scheduled disability. Total deafness in one ear results in a permanent disability compensation of fifty-two (52) weeks. Total bilateral deafness results in a scheduled disability compensation payment for two hundred (200) weeks. For partial deafness, payments are made in direct proportion to the percentage of hearing loss medically demonstrated. Approved industrial hearing loss of 50% in one ear, therefore, would result in a scheduled disability payment of twenty-six (26) weeks, 50% of the scheduled fifty-two (52) weeks payments for total loss of hearing in one ear. This system is simple, easy to administer and straightforward.

The proposed Amendments seek to introduce a far more complex, lengthy, and cumbersome procedure.

For example, Section 6(b) of the proposed Amendments, would measure compensable industrial hearing loss only as inability to hear normal human speech. Loss of hearing, even total deafness, in those frequency ranges above or below the ranges of normal speech would be ignored. However, industrial hearing loss as a result of chronic exposure to noise often is a "medium-tone" or "high-tone" loss, mostly beyond the frequency range of normal speech. Thus, a worker could be totally deaf as a result of industrial noise at all ranges above human speech, yet not be recognized in anyway as an affected worker under the proposed Amendments.

Further, the proposed Amendments do not allow a claim for hearing loss benefits until two (2) months after the harmful noise exposure had ended. In most cases, this means the longshore or harbor worker must retire or otherwise leave the industry before he can even file a claim for benefits.

Moreover, proposed Section 13(g) limits the employer's liability consistent with the exposure attributable to him. In conception, perhaps there is some justification for this rule. In practice, however, the results are mind-boggling. For example:

> EXAMPLE 1: A crane driver is employed out of the Union hiring hall in Los Angeles/Long Beach Harbor, which means that in twenty (20) consecutive work days, the crane driver may have 20 separate employers, all involved in the loading or the unloading of ships. Under the proposed Amendments, because each employer is liable only for his proportionate share of hearing loss, in order to obtain full compensation benefits, the employee must institute claims against every employer. Each employer in turn, would retain a defense attorney. The morass of paperwork, claims and cross claims between the various employers would mean obtaining benefits a monumental undertaking.

Perhaps, in fact, the hearing loss affected employee in the previous example would not have any claim whatsoever against "any" of his numerous employers! Section 13(i) provides, that there is no liability for occupational deafness for a particular employer unless "the employee claiming benefits shall have worked for such employer in employment exposing the employee to harmful noise for a total period of at least ninety (90) days." This could lead to the following:

> EXAMPLE 2: The crane driver above, working out of the union hiring hall at Los Angeles/Long Beach Harbor, because of the very nature of the rotating employment system, during the past five (5) calendar years, worked for each of twenty (20) separate waterfront employers, a total of fifty (50) days for each employer, for a total of one-thousand (1000) working days. At the end of that time, he is totally deaf as a result of industrial noise exposure. However, under sub-section (i), he would have no workers compensation claim at all, since he had not worked for any single employer at least ninety (90) working days. A brother crane driver, however, who had the good fortune to be hired by a single waterfront employer as a steady crane driver for the past five (5) calendar years, who suffered the same industrial noise exposure, resulting in the same total deafness, would have a claim for compensation under the Amendments. This would lead to a bizarre discrimination between employees.

The proposed Amendments create quixotic distinctions between waterfront employees, give rise to the possibility of such multi-party claims that meaningful litigation would be lost in the shuffle created by dozens of defense attorneys on the same claim, and even miss the mark by measuring industrial hearing loss in a range of cycles which is largely outside the range of sound which medical literature confirms as the prime component of industrial hearing loss.

PRESUMPTIONS:

WHO HAS THE BURDEN OF PROOF

Under Section 20 of the existing law, the employee must first establish that the claimed injury occurred at his place of employment. If he is successful, the employer is then obliged to demonstrate that the claimed incident did not cause the injury. In practice, this rebuttable presumption acts to reduce the issues to be litigated to an essential minimum.

Not so under the proposed Amendments. Section 12 of the proposal repeals Section 20 of the existing Act in its entirety. Two results would flow from this change. First and foremost, the quantity of litigated issues presented to the Department of Labor would increase many times further adding to the burden of the already understaffed Deputy Commissioner Offices and expanding the scope of litigation and appeals. Second, elimination of presumptions of coverage under the Act would transform every compensation claim into a battle where the employers' superior power, money, and resources would stack the deck against the injured worker.

REVIEW AND APPEALS; SHOULD THE INJURED WORKER STARVE WHILE THE EMPLOYER EXHAUSTS ADMINISTRATIVE AND JUDICIAL APPEALS

It has already been shown that under the proposed Amendments an injured maritime worker will have a difficult time prosecuting even the most routine of compensation claims. Under existing law, an employer is required to pay benefits once a Compensation Order has been issued by an Administrative Law Judge or the employer faces penalties even if he appeals the Order. In most litigated claims, the injured worker has already been subjected to many months without benefits. Appeals through the various stages after the ALJ Decision, presently may take years. Having proved his claim to the ALJ, the worker should not have to wait this long and fact ruinous financial consequences.

Under the proposed Amendments, the employers can avoid payment of the ALJ Order through the simple expedient of filing an Appeal. The new Amendments provide for a stay of payments while the case wends its way through the Benefits Review Board, Court of Appeals, etc. The employer gets an automatic stay of payment at each level of appeal. The worker is forced to bankruptcy, onto welfare rolls or starved back to work.

Even if it should be proved, at the end of this long, tiresome process that the employer's initial decision to refuse benefits was illegal, totally unjustified, and made only for the purpose of harrassing and gaining financial leverage over the injured worker, there is no recompense. The proposed Amendments eliminate all penalties of every kind whatsoever against even the most blatantly oppressive employer, for taking even the most groundless appeals.

TRANSCRIPT OF KCET TELEVISION SHOW

KCET STUDIO ANNOUNCER:

Tonight on KCET Newsbeat, with Clete Roberts, Business and labor reporter, Sebastian Milito, looks into attemps by industry to weaken federal worker's compensation laws, and energy and enviornment reporter, Sally Garner, reports on congressional debate over renewal of the Clean Air Act. Now here's Clete Roberts.

MR. ROBERTS:

Ladies and gentlemen good evening. The cost of providing workers compensation benefits is a major expense to employers in those industries where the accident rate is high and although workers compensation programs are usually run by the states, Congress in the 1930's responded to labor's call for action on health and safety issues by setting up two special federal programs in the most dangerous industries, mining and maritime. In recent years, benefits in the federal workers compensation programs have surpassed those in the states systems and cost employers a great deal more money, but now, encouraged by the Republican win last November and the new conservative move in Congress, employers want to cut the liberal benefits provided for the several hundred thousand workers covered by these two federal programs. Business and labor reporter Sebastian Milato has more, Sebastian,

MR. MILITO:

Clete, some ten thousandworkers in the Los Angeles, Long Beach Harbor area are covered by the federal Longshore and Harbor Workers' Compensation Act, the L and H Act as it is called is administered by the U.S. Department of Labor, but benefits are paid by the employers and it works this way: If a worker is injured on the job and a temporarily disabled the employer, or the insurance carrier pays a weekly benefit until the worker is able to return to work. Medical bills are also paid, and if the injury results in any degree of permanent disability the worker can file a claim for compensation on the basis that his earning capacity has been diminished and in the case of total disability the worker would receive benefits for the rest of his life. The L and H Act is no different in principal from the state systems, but the benefits are better; an injured worker covered by state compensation in California would be elligible for $175.00 a week. Under federal L and H Act it jumps to over $400.000 a week and the injured worker,can choose his own doctor,something most state systems have restrictions on. And that's a key point. The industry supported the idea of a physician of choice in 1972 when the Act was amended by Congress to give the workers that right. But now the stevedore companies, and they actually employ the workers, say it has led to abuses and they want Congress to change it back.

(Scene: A longshore operation on board a ship)

MR. MILITO:

Before 1972, a longshoreman if injured while working on a ship in port could collect compensation from his employer and sue the ship owner under the Maritime Doctrine of Unseaworthiness, the ship owner would in turn then sue the stevedore company that employed the longshoremen. By eliminating these third party lawsuits, the stevedore companies hoped to cut costs by 30%. A deal was struck in which the workers gave up their right to sue. In exchange the companies provided extended coverage, increased benefits, ended the system of panel company doctors and allowed the workers to choose their own physicians.

Now nearly ten years later the stevedore companies are claiming that their own compensation costs have actually risen by 100% and they want Congress to amend the act. The unions, for their part point to a nearly 500% productivity increase in the longshore industry over the last 20 years. They claim that the companies are not holding up to their end of the bargain or while there is talk of cutting benefits there is no mention of restoring the workers right to sue for unseaworthiness.

(Scene: The office of Bruce Krieger, Welfare Officer of the ILWU, Local 13)

MR. KRIEGER:

They want to strip the legislation that we've been working under for the past eight years. They want to strip it and take back the things they traded to this industry for a fair compensation act. They want to take away our choice of physicians that has proven to be a fair and honest way. They want to go back to panel doctors where they can control the medical picture. And we're very opposed to this. They want to reduce benefits. This Act has allowed the benefits to raise with the cost of living to give a man two thirds of his average weekly wage, and that's fair.

(Scene: Bobby Olvera, Business Agent of Local 13, climbing up a steep makeshift gang way to get on board a ship)

MR. MILITO:

The longshore industry ranks second to mining as the most dangerous. In 1980, 67 longshoremen were killed in accidents on the west coast alone. The constantly changing nature of the work from day to day, where workers don't get a chance to become familiar with the work enviornment, contributes to the danger. Another factor is what the union describes as a 'lax attitude on the part of the ship owners and the stevedore companies toward unsafe work conditions.

MR. OLVERA (to longshoreman):

Is this a gangway? Where's the mate at? Yeah, this is unsafe, Kelly, somebody is going to get hurt.

LONGSHOREMAN:

I asked him an hour ago to put it up.

MR. OLVERA:

You asked him an hour ago?

MR. MILITO:

They weren't going to fix this until you brought it to their attention.

MR. OLVERA:

Unless somebody, either one of the longshoremen or they call a business agent to tell them it's unsafe. We tell them it's unsafe, the men are going to stand by and by that means the production stops so then they fix it immediately.

MR. KRIEGER:

I lost a friend of mine under a large load of steel coming off a ship like this. Wherein the cables holding the boom up, parted because of the excessive load on the gear and the boom came down and crushed the man, the front man, standing there attempting to steady the load. It just came down and crushed him right into the asphalt. There was nothing but a grease spot left. This is a friend of mine by the name of Danny Perlia, some years ago. So that's the type of accidents that can and do happen here on the docks.

MR. MILITO:

When a longshoreman is injured under the Act, the employer is required to pay a weekly compensation benefit up to $426. until the worker returns to work, and pay all medical bills. In practice however, it doesn't always work that way. Bob Olvera suffered injuries to his neck, shoulder and back which kept him in the hospital for several weeks.

MR. OLVERA:

I was sent by stevedore company to a psychiatrist even after numerous doctors agreed that I was not able to perform longshore work. After a short ten minute interview with a psychiatrist they said I was able to resume work and they stopped my compensation at that time, and never did get it resumed until I went to court.

MR. MILITO:

Anthony Agundez was at work in the hold of the ship when he had his accident.

MR. AGUNDEZ:

I had hold of the steering and the wheel fell in the hole and it jerked my arm across my body and I pulled all the muscles and everything and I jammed the two bones up here and they had to take a piece of bone out of there in '79 and during that time, after I was off work for about three months, they stopped my workmen's compensation.

MR. MILITO:

Agundez reinjured his arm this year and went another four months without compensation. Jimmy Hall fell from a hyster and crushed three discs in his back. After extensive treatment his doctor scheduled him for surgery, then the company stepped in.

MR. HALL:

When I arrived home, Metropolitan was on the phone talking to my children wanting them to relay the message to me, that the insurance office at Metropolitan had decided I didn't need surgery and therefore they were cancelling surgery and they were going to set me up some more appointments with some of their doctors for later on.

MR. MILITO:

These men believe that the company, Metropolitan Stevedor, by cutting off their benefits or in one case just forgetting to mail them, and by pressuring their doctors, was attempting to get them to return to work before they were ready. They call that "hardtiming". I went to talk to Don Robertson who heads up the insurance department at Metropolitan Stevedore which is a self insured company and one of the largest stevedore operations in the Harbor.

(Scene: Front desk at Metropolitan Stevedore Company.)

RECEPTIONIST:

Mr. Robertson says no.

MR. MILITO:

He said no? No interview?

RECPTIONIST:

Uh huh.

MR. MILITO:

At all? Is there anyone else here I could talk to about the workmans' comp program? Does he have an assistant?

Metropolitan Stevedore would not comment and in repeated phone calls I was unable to get beyond Robertson's secretary to get the company's side. I was able to obtain a document prepared by Metropolitan's insurance department containing allegations of a wide array of abuses in the furnishing of medical care under the Longshore and Harbor Worker's Compensation Act. The report alleges that there are continuing abuses in medical practices; inaccuracies, overtreatment, overcharging, extended temporary disability and inflated permanent disability ratings. Metropolitan complains that three law firms handle 80% of the cases filed by workers and that they frequently ask for physician changes to one of four doctors or medical groups who the report states may be involved in abusive medical practices. The report criticized the Department of Labor for overruling the company when it has denied payments for medical treatment, which Metropolitan interprets as a failure by the Department to properly monitor the act. Metropolitan reached the conclusion that the injured worker is frequently subjected to substandard treatment by those few physicians who account for most of the longshore claims and they want those doctors excluded from furnishing medical care under the act. Without warning, several months ago the report was offered by Metropolitan as evidence of the need for reform to a Senate Subcommittee holding hearings on the Longshore and Harbor Workers Compensation Act. Knowledge of the report and its allegations sent shock waves through the closely knit water front.

(Scene: Office of Bruce Krieger)

MR. KRIEGER:

There are things in that document and these charges that you'll find are not accurate, there is half truths and there is some very inaccurate statements.

(Scene: Office of Edmund J. Corley, Deputy Commissioner, U.S. Department of Labor)

MR. CORLEY:

The alleged abuses would indicate some fraudulant activity but I think what you're dealing with is a very opinionated position of a very large employer.

(Scene: Office of Thomas Jasperson, M.D., a physician at the Bayport medical group)

DR. JASPERSON:

We do stay completely removed from attorneys and we try to be fair to the insurance company. We don't get any pressure from attorneys or from the union; any suggestions. Our pressure comes only from Metropolitan.

(Scene: Office of James C. Thomason, an attorney with the law firm of Magana, Cathcart, McCarthy & Pierry)

MR. THOMASON:

I've been on both sides of the system and I think that the abuses are more on the part of the employers and insurance carrier than they are on the part of the, and in particular., the injured longshoreman and the ship yard workers.

MR. MILITO:

James Thomason works for one of the law firms criticized in the report by Metropolitan. For 15 years he worked on the other side representing the employers. He even worked for Metropolitan. He accuses the employers for "doctor shopping" for a favorable medical opinion and pressuring the treating physician to declare the injured worker fit to return to work.

MR. MILITO: (To Mr. Thomason)

When you were an attorney representing the defense side, the employer's side, did you feel as strongly as you do now that there were worngful practices or that kind of pressuring going on by the companies?

MR. THOMASON:

Yes I did, to be honest with you. I did and I participated in it and was being paid to represent a client, but we used the same technique. There are doctors in any area that are known to have a particular phyilosophical predilection for giving an opinion that a man either does not need further treatment or is able to work, despite what the treating physician may say.

MR. MILITO:

And so the companies would choose doctors like that to get the sort of supporting medical evidence that they're looking for.

MR. THOMASON:

Right, yes.

MR. MILITO:

Is it true then that the claimant side will do the same thing, will look for doctors who will support the kind of medical opinion they're looking for?

MR. THOMASON:

That sometimes happens, yes. But I think less often than the former. Because we're then put in a position of being, in the adversary situation, where we have to come in and match expert for expert.

(Scene : Office of Dr. Jasperson)

DR. JASPERSON:

I feel that the fellow has to be really in tip top shape to go back to work. Many of them do go back with some residual pain but at least he has to be agile enough to perform the work that he's expected to do down there.

MR. MILITO:

The Bayport medical group in Wilmington started by doctor Thomas Jasperson specializes in industrial medicine. 60% of the patients they see are comp cases. 10% are longshore workers. Jasperson was also named in the Metropolitan report.

MR. MILITO: (To Dr. Jasperson)

As you know Metropolitan Stevedore Company is blaming a large part of the increase in workers comp payments on doctors who they feel are overtreating or biased in favor of the working person.

DR. JASPERSON:

I know that's their allegation and I'm sure Metropolitan has a problem financially between medical payments and legal payments, however, I don't feel I can compromise as a primary physician. When the patient tells me that he feels that it is unsafe for him to work,he's having too much pain to work, I just feel I shouldn't be pressured by anyone to return this man to work.

MR. MILITO:

Jasperson is critical of the medical opinions rendered by some consultants used by the employers because often he says they're not familiar with the work enviornment. Jasperson has actually worked in the hold of a ship unloading cotton in order to be able to better judge when a longshoreman can return to work. He says all of the companies he has worked with, Metropolitan disputes his medical opinion.

DR. JASPERSON:

They're just going for the bucks. I don't think it's anything to do with quality medical care. I don't think they'd know quality medical care if they saw it. I'm concerned if Metropolitan's insurance department were able to pick out their own doctors they would be more inclined in saving dollars than they would be in the patient's care.

(Scene: KCET Studios, with Mr. Milito and Mr. Roberts)

MR. MILITO:

This final note, the Department of Labor which has the responsibility of administering the Longshore and Habor Worker's Act said that they have investigated the allegations contained in the report by Metropolitan Stevedore and have found nothing to support those charges.

MR. ROBERTS:

Sebastian it is unfortunate that we do not have an interview with the Stevedore company that amassed this 150 page report. It's rather puzzling that they made these allegations and wouldn't discuss them with you.

MR. MILITO:

Well it doesn't usually happen, Clete, that the party making allegations does not wish to comment publicly. I think in this case the unions at least have a theory that they don't want to be involved in a public, dragged out battle. They'd rather try to win it..

MR. ROBERTS:

You mean the company?

MR. MILITO:

Yes, they'd rather try to win it in Congress where perhaps there is a leaning toward some changes in the Act anyway.

MR. ROBERTS:

But your efforts to talk with these people, I could see in the interview, completely rebuffed, huh?

MR. MILITO:

That's true and I also spoke with the two other large stevedore companies in the Harbor area and they also refused. They were in sympathy with the claims in the Metropolitan report but did not want to be involved again in any kind of public media dispute.

MR. ROBERTS:

You feel this is a lack of sophistication in handling the press or are they just playing it safe?

MR. MILITO:

Well I don't think it's a lack of sophistication. I think they feel quite confident that they can get the kind of changes they want in this act by not making it a public issue but by simply operating within the confines of their congressional representatives.

MR. ROBERTS:

Thank you very much.

MAGAÑA, CATHCART, McCARTHY & PIERRY
ATTORNEYS AT LAW
301 NORTH AVALON BOULEVARD
WILMINGTON, CALIF 90744
(213) 834-2691 (213) 775-8[illegible]

RAOUL D. MAGAÑA
DANIEL CATHCART
THOMAS J. PIERRY
JAMES J. McCARTHY
A LAW CORPORATION
ANTHONY REYES
CHARLES R. [illegible]
BRIAN R. MAGAÑA
JAMES MICHAEL McADAMS
JAMES C. THOMASON
MARK S. RAGER
MICHAEL D. MOORHEAD
RICHARD L. B[illegible]
WILLIAM H. WIMBATT
JOHN H. DILLARD
F. JOSEPH FORD JR
FRED B. GRIFFIN

LOS ANGELES OFFICE
SUITE 810 GATEWAY WEST BLDG
CENTURY CITY
1901 AVENUE OF THE STARS
LOS ANGELES CALIF 90067
(213) 553-6630

SANTA BARBARA OFFICE
1114 STATE STREET
LA ARCADA BLDG.
SUITE 233
SANTA BARBARA, CALIF. 93101
(805) 963-5878

January 8, 1981

Metropolitan Stevedore
211 NOrth Marine Avenue
Wilmington, California 90744

Re: KENNETH L. DANIELS vs. METROPOLITAN STEVEDORE
D/A: 12-30-80

Gentlemen:

Pleaee be advised that the claimant has selected JOOST VAN ADLESBERG, M. D., as his free choice of treating physician. Please forward an LS-1 form to Dr. Van Adelsberg authorizing treatment as soon as possible.

By copy of this letter I am advising Dr. VAn Adelsberg to submit his report and statement of services rendered to your office.

Thank you for your attention to this matter.

Yours very truly,

MAGANA, CATHCART, McCARTHY & PIERRY

FRED B. GRIFFIN
FBG/lb

cc: Joost Van Adelsberg, M. D.
4201 Torrance Boulevard, Suite 750
Torrance, California 90503

TELEPHONE
(213) 830-6220
(213) 775-3449
CABLE ADDRESS
"METSTECO"

Metropolitan Stevedore Company
Incorporated
211 MARINE AVENUE • POST OFFICE BOX 547
Wilmington, Calif., 90748

January 20, 1981

Fred B. Griffin
Magana, Cathcart, McCarthy & Pierry
301 North Avalon Boulevard
Wilmington, California 90744

RE: Kenneth L. Daniels
vs.
Metropolitan Stevedore Company
D/A: 12/30/80
Our File No.: 800-00194

Dear Mr. Griffin:

This will acknowledge receipt of your letter dated January 8, 1981.

You do not have the right to advise us of a change of physicians, only to request a change of physicians. We assume that this is a request for a change of physicians to Dr. Joost Van Adlesberg. You are hereby advised that the request is denied.

Should you still desire a change of physicians, kindly get in touch with me and hopefully we can agree on a doctor to take over this case.

Very truly yours,

METROPOLITAN STEVEDORE COMPANY

Patricia J. Cuyler

Patricia J. Cuyler
Senior Claims Adjuster

PJC:crp

MAGAÑA, CATHCART, McCARTHY & PIERRY
ATTORNEYS AT LAW
301 NORTH AVALON BOULEVARD
WILMINGTON, CALIF. 90744
(213) 834-2691 (213) 775-8348

RAOUL D. MAGAÑA
DANIEL CATHCART
THOMAS J. PIERRY
JAMES J. McCARTHY
A LAW CORPORATION
ANTHONY REYES
CHARLES D. SNEATHERN
BRIAN R. MAGAÑA
JAMES MICHAEL McADAMS
JAMES C. THOMASON
MARK S. RADER
MICHAEL D. MOORHEAD
RICHARD L. BISETTI
WILLIAM H. WIMSATT
JOHN M. DILLARD
F. JOSEPH FORD, JR.
FRED B. GRIFFIN

LOS ANGELES OFFICE
SUITE 810 GATEWAY WEST BLDG.
CENTURY CITY
1901 AVENUE OF THE STARS
LOS ANGELES, CALIF. 90067
(213) 553-6630

SANTA BARBARA OFFICE
1114 STATE STREET
LA ARCADA BLDG.
SUITE 253
SANTA BARBARA, CALIF. 93101
(805) 963-3678

March 6, 1981

Metropolitan Stevedore
211 Marine Avenue
Wilmington, California

Attention: Pat Cuyler

Re: Kenneth Daniels vs. Metropolitan Stevedore
D/A: 12/30/80
OWCP NO. 18-7869

Dear Ms. Cuyler:

This letter concerns yours of January 20, 1981, in the above matter. As you will recall, we discussed this matter approximately two weeks ago. At that time I told and reiterate now that mine of January 8, 1981, should not be construed as a request for change of physicians. You will note the Form LS-203 filed on behalf of Mr. Daniels indicates, he had not made a selection of physician: Dr. van Adelsberg is that initial choice. I asked that you send me an executed Form LS-1 showing a prior selection if you had one; to date you have not, so I can only assume one does not exist.

Accordingly, I again re~~view~~new my request of Mr. Daniels that you send Dr. van Adelsberg an LS-1 form if you have not already done so. Thank you.

Yours very truly,

MAGANA, CATHCART, McCARTHY & PIERRY

FRED B. GRIFFIN
FBG/cc

MAGAÑA, CATHCART, McCARTHY & PIERRY
ATTORNEYS AT LAW
301 NORTH AVALON BOULEVARD
WILMINGTON, CALIF. 90744
(213) 834-2691 (213) 775-8348

RAOUL D. MAGAÑA
DANIEL CATHCART
THOMAS J. PIERRY
JAMES J. McCARTHY
A LAW CORPORATION
ANTHONY REYES
CHARLES D. SNEATHERN
BRIAN R. MAGAÑA
JAMES MICHAEL McADAMS
JAMES C. THOMASON
MARK S. RADER
MICHAEL D. MOORHEAD
RICHARD L. BISETTI
WILLIAM H. WIMSATT
JOHN M. DILLARD
F. JOSEPH FORD, JR.
FRED B. GRIFFIN

LOS ANGELES OFFICE
SUITE 810 GATEWAY WEST BLDG
CENTURY CITY
1801 AVENUE OF THE STARS
LOS ANGELES, CALIF. 90067
(213) 553-6630

SANTA BARBARA OFFICE
1114 STATE STREET
LA ARCADA BLDG.
SUITE 253
SANTA BARBARA, CALIF. 93101
(805) 963-5878

March 20, 1981

Metropolitan Stevedore
211 Marine Avenue
Wilmington, California

Attention: Pat Cuyler

Re: Kenneth Daniels vs. Metropolitan Stevedore
D/A: 12/30/80

Dear Ms. Cuyler:

I am in receipt of the LS-1 you kindly sent me in this matter. I note that it is unsigned by Mr. Daniels. Accordingly my position is as it was in my letter of March 6, 1981: Mr. Daniels' first and only selection of his treating physician is Joost van Adelsberg, M.D. I again request that you send on LS-1 to Dr. van Adelsberg.

Your LS-207 of January 28, 1981; alleges a release by Dr. McGinn. Plese send me a copy.

Thank you.

Yours very truly,

MAGANA, CATHCART, McCARTHY & PIERRY

FRED B. GRIFFIN
FBG/cc

cc: U.S. Department of Labor
Office of Workers' Compensation Programs
300 South Ferry, Room 2525
Terminal Island, California

MAGAÑA, CATHCART, McCARTHY & PIERRY
ATTORNEYS AT LAW
30½ NORTH AVALON BOULEVARD
WILMINGTON, CALIF. 90744
(213) 834-2601 (213) 775-8518

[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
F. JOSEPH FORD, JR.
FRED B. GRIFFIN

LOS ANGELES OFFICE
SUITE 810 GATEWAY WEST BLDG.
CENTURY CITY
1801 AVENUE OF THE STARS
LOS ANGELES, CALIF. 90067
(213) 553-6630

SANTA BARBARA OFFICE
1114 STATE STREET
LA ARCADA BLDG.
SUITE 25?
SANTA BARBARA, CALIF. 93101
(805) 963-5878

April 9, 1981

U. S. Department of Labor
OWCP
300 South Ferry, Room 2525
Terminal Island, California 90731

RE: KENNETH L. DANIELS vs. METROPOLITAN STEVEDORE
D/A: 12-30-80
OWCP #: 18-7869

Gentlemen:

It is respectfully requested that the above captioned claim be set for informal conference on the basis of free choice of treating physician.

Thank you for your attention to this matter.

Very truly yours,

MAGAÑA, CATHCART, McCARTHY & PIERRY

FRED B. GRIFFIN
FBG/lb

cc: Metropolitan Stevedore Company
211 Marine Avenue
Wilmington, California 90744

U.S. Department of Labor

Employment Standards Administration
Office of Workers' Compensation Programs
Division of Longshore and Harbor Workers' Compensation
300 South Ferry, Room 2525
Terminal Island, CA 90371

APRIL 27, 1981

File Number 18-7869
KENNETH L. DANIELS v. METROPOLITAN STEVEDORE
DOI: 12/30/80

Fred B. Griffin, Esq.
301 N. Avalon Blvd.
Wilmington, CA 90744

Re: Yours 4/9/81

Dear Mr. Griffin:

The Department's file does not contain a LS-1 signed by the claimant. It is requested that same be submitted by Metropolitan Stevedore prior to placing this matter on calendar.

Sincerely,

Lillian Coit

LILLIAN COIT, Claims Examiner
(213) 548-2328

cc: Metropolitan Stevedore

TELEPHONE
(213) 830-6220
(213) 775-3445
CABLE ADDRESS
"METSTECO"

Metropolitan Stevedore Company
Incorporated
211 MARINE AVENUE • POST OFFICE BOX 347
Wilmington, Calif., 90748

April 28th, 1981

Fred B. Griffin
Law Offices of
Magana, Cathcart, McCarthy & Pierry
301 North Avalon Boulevard
Wilmington, California 90744

RE: Kenneth L. Daniels
D/I: 12/30/80
Our File No.: 800-00194
OWCP File No.: 18-7869

Dear Mr. Griffin:

I am in receipt of your request to the Department of Labor for an informal conference pertaining to your client's right to a free choice of physician. An LS-1 was submitted to Dr. Van Adelsberg on 3/24/81.

Please advise this office why an informal conference is needed at this time.

Thank you for your attention to this matter.

Very truly yours,

METROPOLITAN STEVEDORE COMPANY
Ann Trotechaud
Ann Trotechaud
Senior Claims Adjuster

AT:crp

MA[illegible]ÑA, CATHCART, McCARTHY & [illegible]ERRY
ATTORNEYS AT LAW
301 NORTH AVALON BOULEVARD
WILMINGTON, CALIF. 90744
(213) 834-2691 (213) 775-8348

RAOUL D. MAGAÑA
DANIEL CATHCART
THOMAS J. PIERRY
JAMES J. McCARTHY
A LAW CORPORATION
ANTHONY REYES
CHARLES D. SNEATHERN
BRIAN R. MAGAÑA
JAMES MICHAEL McADAMS
JAMES C. THOMASON
MARK S. RADER
MICHAEL D. MOORHEAD
RICHARD L. BISETTI
WILLIAM H. WIMSATT
JOHN M. DILLARD
F. JOSEPH FORD, JR.
FRED B. GRIFFIN

LOS ANGELES OFFICE
SUITE 810 GATEWAY WEST BLDG
CENTURY CITY
1801 AVENUE OF THE STARS
LOS ANGELES CALIF 90067
(213) 553-6830

SANTA BARBARA OFFICE
1114 STATE STREET
LA ARCADA BLDG
SUITE 253
SANTA BARBARA, CALIF 93101
(805) 963-5478

August 15, 1979

James J. Wood, Esq.
Attorney at Law
3441 East Broadway
Long Beach, California

Re: Anthony Agundez vs. Metropolitan Stevedore
D/A: 10/21/78
OWCP NO. 13-59185

Dear Mr. Wood:

I called your office twice yesterday and left messages for you to call me on this case. You apparently were in court all day and unable to respond to my telephone messages.

I met you at the California Workers' Compensation Appeals Board this morning.

I asked you if you were aware that your client, Metropolitan Stevedore had filed an LS-208 form in this case. You stated that you were cognizant of this fact.

I asked you if they intended to terminate Mr. Agundez's compensation benefits at this time. You stated that you intended to file a Notice of Controversion and that, in fact, your client had terminated compensation benefits as of the date of the LS-208 form.

I stated to you that it has always been the policy of the Department of Labor, especially in cases such as this, not to terminate compensation benefits until after a Conference has been held. You stated "you say that, I don't know that".

I informed you that Mr. Agundez is scheduled for surgery to his injured shoulder on August 22, 1979. That surgery has been scheduled and will be performed by his treating physician, Jordan Rhodes, M.D. You stated that that made no difference to you and asked me if I knew what filing an LS-208 form by your client meant. I informed you that I consider this action of your client to be just another instance of intentional infliction of emotional harm upon Mr. Agundez and his wife. I informed you that I intended to pursue all legal remedies.

Let me review with you your client's conduct in this case.

On February 9, 1979, I discussed this case with Mr. Tisius at Metropolitan Stevedore Company. I informed Mr. Tisius that Mr. Agundez after an attempt to return to work had consulted with Dr. Hubbard at the Kaiser facility. Dr. Hubbard referred the claimant to Jordan Rhodes, M.D., a specialist in orthopedics for evaluation. A day or two subsequent Mr. Tisius claimed that his office had checked with Dr. Hubbard and had been advised that Dr. Hubbard had not referred the claimant to Jordan Rhodes, M.D. He denied Metropolitan's liability for expenses incurred for Dr. Rhodes's treatment. I informed Mr. Agundez of this matter and he became very emotionally upset. Without my knowledge, he went to Dr. Hubbard and obtained a statement signed by the doctor that Dr. Hubbard had, in fact, referred the claimant to Dr. Rhodes. A copy of that document is in the Department of Labor's file and your file.

On March 19, 1979, Mr. Tisius and I agreed that the claimant might be examined by Dr. William Rhorer as an Independent Medical Examiner. It was further agreed that compensation benefits would be reinstated subject to Dr. Rhorer's report.

On April 22, 1979, Metropolitan Stevedore terminated compensation benefits and filed a Notice of Controversion on April 30, 1979. Benefits were terminated. Again this created tremendous financial hardships for the Agundez's.

A Conference was held on May 25, 1979, before Edward Corley, Assistant Deputy Commissioner. Mr. Corley found Metropolitan Stevedore's actions unjustified and recommended that temporary disability benefits should be reinstated immediately and retroactiv to April 23, 1979. In addition, he ordered that attorneys fees be paid to my office and that Dr. Rhodes bill be paid.

Compensation benefits were reinstated and paid through July 22, 1979. The attorneys fees awarded have not been paid to date. Dr. Rhodes bill was finally paid on July 9, 1979.

On July 26, 1979, you served upon me the medical report of Jordan Rhodes, M.D. dated, July 23, 1979 and the medical report of James London, M.D. dated, July 16, 1979. Please refer to the fourth paragraph of Dr. Rhodes report of July 23, 1979. The doctor in substance notes that on July 12, 1979, Mr. Agundez's shoulder was injected and following that injection the patient was completely free of pain for three to four days. You will note that Dr. London saw Mr. Agundez during this period of time. You will further note that Dr. Rhodes reports that the pain returned and Mr. Agundez's only alternative is surgery. That surgery is scheduled for August 22, 1979.

In spite of your client's conduct which I believe clearly demonstrates that they have intentionally forced financial hardships upon Mr. and Mrs. Agundez that have led to severe emotional upset for both Mr. and Mrs. Agundez, I ask that you contact Metropolitan Stevedore at your earliest convenience and review this matter with them. Please point out to them that they did not seek to have Mr. Agundez re-examined by Dr. Rhorer in order to determine whether or not his condition was, in fact, permanent and stationary. Instead they "doctor shopped" until they found someone who was in a position to note that the patient was permanent and stationary and had no disability. Please discuss the impact of Renteria vs. Orange with your client

If I have in anyway misinterpreted your client's intentional inflection of emotional harm upon Mr. Agundez, now is there chance to demonstrate that I am wrong and for them to act in good faith. Rather than inflicting more suffering on Mr. and Mrs. Agundez, it appears to me that the humane course of action would be to pay Mr. Agundez his disability benefits until the time that we can obtain an emergency Informal Conference with the Department of Labor.

You know that Mr. Corley is on vacation until August 21, 1979. You know that upon his return we will be able to obtain an emergency Informal Conference within a matter of days.

On behalf of Mr. Agundez I anxiously await your early response.

Yours very truly,

MAGANA, CATHCART, McCARTHY & PIERRY

THOMAS J. PIERRY
TJP/cc

MAGAÑA, CATHCART, McCARTHY & PIERRY
ATTORNEYS AT LAW
301 NORTH AVALON BOULEVARD
WILMINGTON, CALIF. 90744
(213) 834-269 (213) 775-8348

RAOUL D. MAGAÑA
DANIEL CATHCART
THOMAS J. PIERRY
JAMES J. McCARTHY
A LAW CORPORATION
ANTHONY REYES
CHARLES D. SWEATHERN
BRIAN R. MAGAÑA
JAMES MICHAEL McADAMS
JAMES C. THOMASON
MARK S. RADER
MICHAEL D. MOORHEAD
RICHARD L. BISETTI
WILLIAM H. WIMSATT
JOHN H. DILLARD
J. JOSEPH FORD, JR.
FRED B. GRIFFIN

LOS ANGELES OFFICE
SUITE 810 GATEWAY WEST BLDG
CENTURY CITY
1801 AVENUE OF THE STARS
LOS ANGELES, CALIF. 90067
(213) 553-6630

SANTA BARBARA OFFICE
1114 STATE STREET
LA ARCADA BLDG.
SUITE 253
SANTA BARBARA, CALIF. 93101
(805) 963-3878

August 20, 1979

James J. Wood, Esq.
Attorney at Law
3441 East Broadway
Long Beach, California

Re: Anthony Agundez vs. Metropolitan Stevedore
D/A: 10/21/78
OWCP NO. 13-59185

Dear Mr. Wood:

Neither you nor your client has responded to my letter of August 15, 1979.

Are you aware of the action taken by your client presumably in response to my letter of August 15, 1979?

Mr. Agundez called my office this morning and advised me that he received a telephone call from Marie at South Bay Hospital on Saturday, August 18, 1979. Mr. Agundez was informed that Metropolitan Stevedore Company had called the hospital's accounting department and said that they were not going to be responsible for any bills incurred as a result of surgery to Mr. Agundez. They further informed the hospital that if they wished to render care to Mr. Agundez they better get paid before the surgery was performed.

Jordan Rhodes, M.D. called my office this morning and informed me that he received a letter from Metropolitan Stevedore Company instructing him to reconsider performing the surgery on Mr. Agundez based upon some substantial report by James London, M.D.

Your client's machinations in this case go beyond intentional infliction of emotional harm and border on gangsterism. How dare they intrude upon Mr. Agundez's relationship with his doctor and his hospital!

Mrs. Agundez advises me that her husband is near mental collapse.

I again suggest that this matter be handled properly. The following should be done:

1) Cancel Surgery;

2) Reinstitute compensation benefits; and,

3) Schedule an emergency hearing before the United States Department of Labor.

In spite of the damage already done, there is still time. Intentionally persecuting Mr. and Mrs. Agundez is not the way to handle a claim. Please communicate with me as soon as possible.

Yours very truly,

MAGANA, CATHCART, McCARTHY & PIERRY

THOMAS J. PIERRY
TJP/cc

cc: Metropolitan Stevedore
211 Marine Avenue
Wilmington, California

MAGAÑA, CATHCART, McCARTHY & PIERRY
ATTORNEYS AT LAW
301 NORTH AVALON BOULEVARD
WILMINGTON, CALIF. 90744
(213) 834-2691   (213) 775-5348

LOS ANGELES OFFICE
SUITE 810 GATEWAY WEST BLDG
CENTURY CITY
1801 AVENUE OF THE STARS
LOS ANGELES, CALIF. 90067

RAOUL D. MAGAÑA
DANIEL CATHCART
THOMAS J. PIERRY
JAMES J. McCARTHY
A LAW CORPORATION
ANTHONY REYES
CHARLES D. SWEATHERN
BRIAN R. MAGAÑA
JAMES MICHAEL McADAMS
JAMES C. THOMASON
MARK S. RADER
MICHAEL D. MOORHEAD
RICHARD L. BISETTI
WILLIAM H. WIMSATT
JOHN M. DILLARD
F. JOSEPH FORD, JR.
FRED B. GRIFFIN

O ARTICLE TO COVER FIRST CLASS POSTAGE.
S FOR ANY SELECTED OPTIONAL SERVICES (see front)

the gummed stub on the left portion of the address side of
and present the article at a post office service window or
carrier

ch the gummed stub on the left portion of the address
on the receipt, and mail the article

rtified mail number and your name and address on a return
the front of the article by means of the gummed ends if space
Endorse front of article RETURN RECEIPT REQUESTED

addressee or to an authorized agent of the addressee.
front of the article

the appropriate spaces on the front of this receipt. If return
in item 1 of Form 3811

August 23, 1979

James J. Wood, Esq.
Attorney at Law
3441 East Broadway
Long Beach, California

Re: Anthony Agundez vs. Metropolitan Stevedore
D/A: 10/21/78
OWCP NO. 13-59185

Dear Mr. Wood:

I received your letter this afternoon, dated, August 22, 1979 and the attached Controversion.

In fact, you have not attempted to communicate with me by telephone. In fact, Mr. Agundez was operated on this morning August 23, 1979 by Jordan Rhodes, M.D.

For the record your letter and Notice of Controversion indicated a reliance upon the opinion of Dr. William Rhorer. Dr. Rhorer's report of April 12, 1979 stated that he did not believe "the condition of this patient's right shoulder should yet be considered permanent and stationary for rating purposes". The doctor further states that should there be no recognized change in the next two or three months then the condition may be considered permanent and stationary for the purpose of rating.

In fact, Dr. Rhodes discovered x-ray changes during the ensuing two or three months.

Dr. Rhorer stated "the patient is presently partially disabled to the extent he does have pain in the right shoulder that becomes evident with overhead elevation of the arm. He has only a limited capacity for carrying out work which demands such use."

If you had bothered to appear at either conference set before Mr. Corley, you would know that Mr. Bruce Krieger the Welfare Officer of the International Longshoremen and Warehousemen's Union appeared at the conference and testified that there is no work available on the waterfront for a longshoreman with Mr. Agundez's limitations.

Finally, it is interesting to note that neither you nor your client has in anyway responded to my request that this claim be handled in a professional manner as outlined in both of my letters. Your sole response to my letters has been to file a Notice of Controversion replete with self serving statements attempting to justify the intentional infliction of emotional harm upon Mr. and Mrs. Agundez.

Yours very truly,

MAGANA, CATHCART, McCARTHY & PIERRY

Thomas

THOMAS J. PIERRY
TJP/cc

MAGANA, CATHCART, McCARTHY & PIERRY
ATTORNEYS AT LAW
301 NORTH AVALON BOULEVARD
WILMINGTON, CALIF. 90744
(213) 834-2691 (213) 775-8348

RAOUL D. MAGANA
~~DANIEL CATHCART~~
THOMAS J. PIERRY
JAMES J. McCARTHY
A LAW CORPORATION
ANTHONY REYES
CHARLES D. SNEATHERN
BRIAN R. MAGAÑA
JAMES MICHAEL McADAMS
JAMES C. THOMASON
MARK S. RADER
MICHAEL D. MOORHEAD
RICHARD L. BISETTI
WILLIAM H. WIMSATT
JOHN M. DILLARD
F. JOSEPH FORD, JR.
FRED B. GRIFFIN

LOS ANGELES OFFICE
SUITE 810 GATEWAY WEST BLDG
CENTURY CITY
1801 AVENUE OF THE STARS
LOS ANGELES, CALIF. 90067
(213) 553-6630

SANTA BARBARA OFFICE
1114 STATE STREET
LA ARCADA BLDG.
SUITE 253
SANTA BARBARA, CALIF. 93101
(805) 963-5876

March 20, 1981

Carole Fraser, Claims Examiner
United States Department of Labor
Office of Workers' Compensation Programs
300 South Ferry, Room 2525
Terminal Island, California 90731

Re: Anthony Agundez vs. Metropolitan Stevedore
D/A: 10/21/78
OWCP NO. 13-59185

Dear Ms. Fraser:

As you will recall at the Informal Conference of March 4, 1981, Mr. Wood phoned in the position of the Stevedore, which was that Mr. Agundez's temporary disability would be paid from September 5, 1980, through the present and continuing and surgery would be authorized. Mr. Agundez was informed today at the office of Jordan Rhodes, M.D. that surgery has not been authorized and the doctor's has not been paid. I have called Mr. Wood this date and left a message to this effect.

On March 4, 1981, I stated the claimant's position to be in part that the Stevedore's pattern of conduct in this case puts in issue its right to remain self-insured under the Act and requested a further Conference with either yourself or the Deputy Commissioner on this. This latest event is further evidence of the pattern referred to.

Thank you.

Yours very truly,

MAGANA, CATHCART, McCARTHY & PIERRY

Fred B. Griffin

FRED B. GRIFFIN
FBG/cc

cc: Metropolitan Stevedore
211 Marine Avenue
Wilmington, California

LAW OFFICES
JOHN A. MARIN
A PROFESSIONAL LAW CORPORATION

John A. Marin
Anthony J. Battaglia
Charles D. Naylor
Charles C. Ryan

HARBOR OFFICE
522 NORTH AVALON BOULEVARD
WILMINGTON, CALIFORNIA 90744
AREA CODE 213 830-2121
775-3515

SAN DIEGO OFFICE
1268 KETTNER BOULEVARD
SAN DIEGO, CALIFORNIA 92101
AREA CODE 714 232-6431

PLEASE REPLY TO:
Harbor Office

April 3, 1981

Mr. Bruce Kreiger
I.L.W.U. - Local 13
231 West "C" Street
Wilmington, CA 90744

Dear Bruce:

Enclosed are four Metropolitan Stevedore files which are indicative of their standard practices and positions under the L & H Act.

HENRY COBOS: Enclosed is the report of Peter Lorman, M.D. dated August 25, 1977 which indicates that Mr. Cobos could return to work without restrictions, no further treatment was necessary, and is the reason Metropolitan cut off Mr. Cobos' total temporary disability.

Drs. Booth and Bonecutter were used as Agreed on Medical Examiners in this case. Both doctors found that Mr. Cobos had suffered a 20% wholeman disability. They apportioned 50% of this to the specific injury and 50% to pre-existing conditions. Clearly however Mr. Cobos was disabled at the time of the examination of Dr. Lorman and he should not have returned to work without any premanent disability rating.

ISIDOR VIDUCIC: Enclosed are copies of letters received from Metropolitan Stevedore as well as reports by Bernard Cooperman, M.D. These letters clearly show how Metropolitan uses Dr. Cooperman to down-play any permanent disability and how they write and influence the doctor's opinion.

The facts behind this case follow. Mr. Viducic suffered an injury in 1970, one in 1972, and still another in 1978. Dr. Cooperman saw Mr. Viducic on June 30, 1978. At this time, in his report that I have enclosed, Dr. Cooperman finds a 6% wholeman disability and apportioned that 50% to the 1970 injury and 50% to the 1972 injury. Dr. Cooperman was then used as a consultant on November 20, 1979 (a copy of the report is enclosed). Dr. Cooperman states in this report that Mr. Viducic's disability is unchanged. This I read to mean that Mr. Viducic still continues to have this 6% wholeman disability. Thereafter, Kathy Sugawara from Metropolitan Stevedore wrote Dr. Cooperman a letter on August 11, 1980. The contents of this letter we do not have. However, on August 19, 1980, Dr. Cooperman then states that Mr. Viducic's permanent disability should have been 2% of the wholeman, but in light of what was presented him in the August 11, 1980 letter, he is going to reduce Mr. Viducic's permanent disability to 1%.

The above sequence is indicative of how Metropolitan uses doctors, specifically Dr. Cooperman, to obtain reports in their favor. It shows how Metropolitan writes their doctors, giving information to reduce a medical they believe to be too high. But above all, it shows how the doctors respond to these requests.

JOHN BABICH: Enclosed is a report from Richard A. Fixler, M.D. dated August 1, 1979. Dr. Fixler's report is 11 pages in length but the most interesting portion of this report is the ultimate disability rating. On page 10, continuing on page 11, he states:

> "There are no work restrictions related to these conditions. The residuals of the two industrials should be apportioned forty percent (40%) to the accident of August 6, 1978 and sixty percent (60%) to the accident of January 4, 1979. With regard to percentage of disability, there is no ratable disability caused by the two industrial accidents."

The above words of Dr. Fixler have little, if any, sense in a disability rating. First, he apportions 40% - 60% to the two accidents that Mr. Babich was involved in. Thereafter, he states that there is no permanent disability. This indicates that although there is no permanent disability, he can apportion it 40% to one accident and 60% to another. This is absurd!

Philip Vlaic:

FACTS: Mr. Vlaic sustained a back sprain in 1974. He was compensated by receiving temporary total and temporary partial disability. The total amount equaled $2077.00 (a copy of the LS-208 is enclosed).

In December of 1979, Mr. Vlaic suffered a severe back injury. This injury has resulted in a permanent disability and loss of working hours. This loss amounts to a 10% - 15% impairment to the whole person.

METROPOLITAN'S CONTENTIONS: Metropolitan now contends they should be entitled to an 8(f) defense because of the pre-existing 1974 injury. They argue, through their attorneys, that Mr. Vlaic was severely injured in 1974.

Letter to Bruce Kreiger
Re: Cobos/I. Viducic/J. Babich/P. Vlaic
April 3, 1981
Page Three

VLAIC'S CONTENTIONS: See enclosed letter by Robert W. Nizich dated February 25, 1981.

MEDICAL EVIDENCE: A response to a letter written by James Callahan (Metropolitan) to Dr. Marinow puts Mr. Vlaic's permanent disability as the result of the 1979 injury at 7% - 8% (letter enclosed). Next, apparently unsatisfied with Dr. Marinow's evaluation, Metropolitan sets up an examination with Dr. Cooperman. Dr. Cooperman fulfills Metropolitan's desires by giving an 8(f) defense. Dr. Cooperman, finds an 8% wholeman impairment but apportions 4% to the 1974 injury and 4% to the 1979 injury (report enclosed).

The above illustrates how Metropolitan "doctor shops". It illustrates how Metropolitan writes to the doctors and influences their decisions and how, at least, Dr. Cooperman responds.

I hope this will aid you in your task.

Very truly yours,

Robert W Nizich
ROBERT W. NIZICH

RWN:slr
encls.

PETER S. [illegible]RMAN, M.D.
A PROFESSIONAL CORPORATION
PALOS VERDES MEDICAL CENTER, SUITE 244
927 DEEP VALLEY DRIVE
ROLLING HILLS ESTATES, CALIFORNIA 90274
TELEPHONE (213) 377-0353

FELLOW OF THE AMERICAN BOARD
OF ORTHOPAEDIC SURGERY

FELLOW OF THE AMERICAN
COLLEGE OF SURGEONS

August 25, 1977

Metropolitan Stevedore Company
P.O. Box 547
Wilmington, CA 90748

Attention: Paul Tisius

Employee: Henry Cobos
Employer: Metropolitan Stevedore
D/I: 3-2-77

Dear Mr. Tisius:

I am in receipt of your letter dated August 15, 1977 and have reviewed the enclosed file.

As you will recall, Mr. Henry Cobos first came under our care on 4-21-77, when we evaluated him for low back pain. A diagnosis of a resolving contusion to the lumbosacral spine was made and after certain conservative recommendations were made for the patient's care, he was subsequently referred back to the office of Dr. Thomas Jasperson.

At your request, the patient was orthopedically re-evaluated in this office on 8-25-77. When questioned at the time of our repeat office visit, the patient informs us that he is not working at this time. He states that he has worked off and on since the time of the injury, sometimes for as long as a month, however, he has not worked in the last month.

When questioned about medical care, the patient states that he sees a chiropractor in the Anaheim area, who treats the patient approximately three times a week with the usual chiropractic manipulations.

When questioned about his back symptoms, the patient states he has pain in the lumbosacral region of the spine. He states the pain radiates to both hips. He denies numbness or weakness in the extremities.

A complete orthopedic re-evaluation, including review of the initial roentgenograms, was carried out at the time of today's office visit. Aside from some slight limitation of back motion, which was more of a subjective parameter, depending upon how much the patient really wants to bend his back, there were no positive objective findings. There was no evidence of nerve root pressure or other signs suggestive of disk pathology.

We have reviewed the file that was enclosed with your letter. It should be noted that a diagnostic EMG was carried out by Dr. Ronald Farran on

July 20, 1977. The EMG was noted to be entirely within normal limits, which more-or-less goes along with our examination of today.

Review of an initial report of the chiropractor in the Anaheim area shows that the patient did sustain a strain to the lumbosacral spine with nothing more than that.

Review of the file referrable to the 1973 injury has been reviewed. Apparently, the patient injured his back and there was some question as to whether a myelogram should be performed. Apparently this was never carried out. The patient was seen by a Dr. Paul Cohen in November of 1973, and he felt that the patient's back problem was due to a strain.

In conclusion, we can state that as a result of the 3-2-77 industrial accident, the patient did sustain a strain to his lumbosacral spine. This apparently represents a recurrence of the prior injury occurring in 1973. Our clinical evaluation showed evidence of nothing more than a muscular strain, and this was apparently confirmed by the diagnostic EMG carried out by Dr. Farran.

Therefore, we feel that, based upon our examination today and based upon the history as outlined above, the patient should be cleared to return to work. We feel that further diagnostic testing is not in order and we would question the value of the continued chiropractic treatments to the patient's back considering the five month time interval since the initial injury.

Therefore, we are clearing the patient to resume pre-injury work activities and are discharging him from our office as of the date of this evaluation.

Very truly yours,

Peter S. Lorman, M.D.

Peter S. Lorman, M.D.

PSL:mg

ARLES R. BOOTH, M.D., INC.
Orthopedic Surgery
4155 OUTER TRAFFIC CIRCLE DRIVE • LONG BEACH, CALIFORNIA 90804
TELEPHONE 597-1338

ORTHOPEDIC EVALUATION
May 3, 1978

TO WHOM IT MAY CONCERN:

RE: Henry COBOS
CASE: 63036-B
EMP: Metropolitan Stevedore Company
INS: Permissibly Self-Insured
FILE: 13-23179 (Injury 4-17-73)
FILE: 13-42445 (Injury 3- 2-77)

Mr. Cobos was interviewed and examined in my office this date.

SUBJECTIVE COMPLAINTS:

(1) Pain, cervical spine, extending into the upper shoulders, aggravated by turning the head, hyperextension, lifting, and other heavy work done with the upper extremities;
(2) Headaches, especially the left side of the head;
(3) Pain extends into the arms and into the ring and little fingers;
(4) No problem with the ankle;
(5) Constant pain, low back, with extension into the ght leg with occasional pain in the left leg;
(6) Numbness, both legs and feet;
(7) Pain aggravated by walking, standing, bending, stooping, lifting, cold weather.

HISTORY:

The patient advises that he sustained two industrial injuries which are under consideration at the present time. He has sustained other injuries but the cover letter received by this examiner directs attention to these two:

HISTORY: (CONTINUED)

The first of these occurred on or about April 17, 1973, while he was employed as a longshoreman by Metropolitan Stevedore. He states the injury occurred as he was working with cases of bananas. He threw a box of bananas and apparently simultaneously turned and stepped on a broken grate. He sustained injuries to his neck, low back, right shoulder, and right ankle, as well as his buttocks - when he fell.

He indicates he subsequently sought medical care from Doctor Jasperson. Examination was performed, x-rays were secured and he was started on physical therapy including ultrasound, hot packs, and other modalities. He indicates he continued under the care of Doctor Jasperson for about two years, receiving physical therapy "off and on" during this time.

Mr. Cobos was off work for about two months following the injury and then returned to work.

About three days later he reinjured his back at home and was off work then for two months. This subsequently cleared so that his status was "about like it was" prior to the home injury.

The patient was seen in consultation by Doctor Roger Slater on March 25, 1974. Doctor Slater indicated the patient had a previous neck injury in 1967. Doctor Slater also indicated the only abnormality was an absent knee jerk on the right.

Apparently an electromyographic study had been performed on July 17, 1973, and was normal. Doctor Slater felt, if the patient so desired, contrast myelography could be carried out. This apparently was not performed.

Mr. Cobos apparently was also seen by Doctor Paul Cohen on November 12, 1973. Doctor Cohen indicated positive findings of tenderness and decrease of motion, lumbosacral spine. He also suggested that a myelogram could be done but he did not definitely recommend same.

The patient advises that the 1973 injury resulted in residuals primarily to his low back.

He sustained another industrial injury on or about March 2, 1977. Again he was employed as a longshoreman by Metropolitan Stevedore Company. At the time he was working with citrus. A load of oranges fell from a hook and twenty-two boxes of them dropped on him. He was leaning on the edge of the loading dock at the time and was pushed back against the dock when the boxes struck him. He apparently was knocked down and the boxes were removed by fellow workers. He continued working. Pain increased and his back stiffened

HISTORY: (CONTINUED)

so that the following day he reported to Doctor Jasperson's office. Examination was carried out, x-rays were secured, and he was started on physical therapy and provided with medication.

He indicates he was subsequently sent to Doctor Kim and admitted to Pacific Hospital. Contrast myelography was performed. This was noted to show some indentation at the L4-5 and L5-S1 levels and was stated to probably represent herniated disc. Doctor Kim recommended surgery.

Subsequent to that the patient was seen by Doctor Bernard Cooperman who submitted a rather comprehensive report which recommended against surgery. Doctor Cooperman felt, if the patient insisted, he could not be deprived of same.

The records indicate the patient was also seen by Doctor Peter Lorman not too long after the injury. There is little documented in the way of physical findings. He apparently was referred for an electromyographic study which was declared negative.

Mr. Cobos advises that he tried to return to work two weeks after the injury and worked light duty for two weeks. He was then not able to continue. He returned to work again in June, 1977, and worked until mid-July. He indicates he has not worked since.

This man admits to a previous back injury in 1965 when he "pulled a muscle." He was off work "a week or two" and returned to work. He believes he recovered completely.

The records were submitted from the Kaiser Permanente Medical Facility, indicating Mr. Cobos was seen in neurological consultation in 1971, apparently for headaches. It is also indicated that he had a seizure episode in 1957. The impression was that of no neurologic disorder - psychogenic headache.

Referable to the neck, Mr. Cobos advises that there had been considerable improvement following the first injury with only minor difficulty up until the injury of 1977.

He indicates the right ankle injury has improved to the extent that it no longer gives him difficulty.

This man was seen by Doctor James Coulter in neurosurgical consultation in October, 1977, apparently complaining of significant neck difficulty at that time.

PHYSICAL EXAMINATION:

GENERAL: The patient is a well-developed, well-nourished, cooperative male.

CERVICAL SPINE;
UPPER EXTREMITIES; and
DORSAL SPINE: There is some posterior tenderness but none involving the scalene areas. There is no tenderness of the supraclavicular fossae. The posterior tenderness extends into the upper trapezius ridges and does not involve the scapulohumeral or acromioclavicular joints.

He forward flexes, with the chin being brought to within one inch of the sternum. Hyperextension is 80 per cent of normal. Lateral rotation to the left and right is minimally restricted. Lateral flexion to the left and right is about 80 per cent of normal. Shoulder motion is normal bilaterally.

MEASUREMENTS:	RIGHT	LEFT
Circumference of BICEPS	13-7/8"	13-3/4"
Circumference of FOREARM	12-3/8"	12-1/8"

The deep tendon reflexes are symmetrical in the biceps, triceps, and brachio-radialis tendons. Sensation appears to be intact in both upper extremities with no evidence of atrophy of the intrinsic muscles of either hand.

There is no tenderness noted in the dorsal spine. There is no lateral curvature or significantly increased kyphosis. There is no tenderness. Motion appears normal.

LUMBOSACRAL SPINE; and
LOWER EXTREMITIES: The patient walks reasonably well on heels and toes. He squats well and rises from this position well.

He forward flexes, with the knees in extension, bringing his outstretched fingertips to within eleven inches of the floor. There is almost but not quite complete reversal of the normal lordotic curvature. There is no evidence of muscle spasm. Lateral flexion to the left and right shows the right to be 70 to 75 per cent of normal and the left is 60 to 65 per cent of normal.

LUMBOSACRAL SPINE; and
LOWER EXTREMITIES: (CONTINUED)

Rotation is minimally restricted right and left. Extension is 70 per cent of normal.

In the supine position straight-leg raising is 65/65. In the sitting position straight-leg raising is 85/90. Fabere is mildly positive left and right. Lasegue's is negative. Knee-to-chest is resisted at about 80 per cent of normal.

In the prone position there is noted to be tenderness over the lower half of the lumbar spine, extending into the paravertebral musculature - more so on the right. There is no definite sciatic nerve or notch tenderness.

MEASUREMENTS:	RIGHT	LEFT
LEG LENGTHS	39 "	39 "
Circumference of CALF	13-1/2"	13-1/2"
Circumference of THIGH	17-5/8"	17-1/2"

The patellar reflexes appear to be symmetrical with perhaps a minimal decrease without reinforcement on the right - which appears to correct. The Achilles' reflexes are symmetrical right and left.

There is some decreased sensation alleged about both feet but none over the posterior calves or thighs.

X-RAYS: Multiple views were secured of the LUMBOSACRAL SPINE: The AP view shows the hip and sacroiliac joints to be free of degenerative process. The lumbar vertebrae appear transitional. There is a small amount of retained contrast medium. The lateral view shows good preservation of the disc spaces and vertebral bodies. There is a tendency toward anterior osteophytosis and posterior osteophytosis. Spot lateral of the lumbosacral joint shows no narrowing of the LS disc space. The oblique views demonstrate no evidence of pars interarticularis defect. Ferguson's view suggests sacralization of the fifth lumbar vertebra on the right with a small pseudarticulation noted on the left.

X-RAYS: (CONTINUED) CERVICAL SPINE: The AP view shows early degenerative changes of Luschka's joints. The atlanto-axial joint shows no evidence of abnormality. The lateral view shows normal lordotic curvature with good preservation of the disc spaces and vertebral bodies. There is a rather significant posterior osteophyte at the C6 level. The oblique views show some osteophytic impingement of the neural foramina at that level, especially on the right.

DIAGNOSTIC IMPRESSION:

(1) Sprain, cervical spine;
(2) Sprain, lumbosacral spine.

COMMENTS:

The patient's condition is permanent, stationary, and ready for rating.

I do not believe discogenic disease of the lumbar spine can be diagnosed on the basis of my examination today.

It would appear that at best the myelogram could be considered equivocal and often an indentation in the dye column is caused by posterior osteophytosis. It is well known that removal of an easily-diagnosed and easily-removable extruded disc often produces little in the way of admitted benefit to the patient and, certainly, in this particular case it would be highly unlikely that an extruded fragment could be recovered at surgery. This is to say that any finding of a positive nature would probably be a mildly bulging disc. This would most assuredly produce less than an ideal result and there is a distinct possibility of leaving the patient with a little more disability. As a consequence, it is my opinion that surgery should not be performed. This is not to say that the door should be shut on surgical intervention in the future in the event the applicant has a significant worsening when a herniated disc can be diagnosed.

It is my opinion that as a consequence of the two industrial injuries under consideration, Mr. Coros has sustained a permanent, partial disability of twenty (20) per cent to the axial skeleton, i.e. [illegible] per cent loss of the individual as a whole. Looking into the records, it appears this [illegible] had [illegible] and was considered for a [illegible]

RE: Henry COBOS

Page 7
May 3, 1978

COMMENTS: (CONTINUED)

50-50
Apportion

following the 1973 injury. As a consequence, it is my opinion that one-half of the disability be apportioned to the 1973 injury and one-half to the 1977 injury.

This disability is described without apportionment to any non-industrial causes. This appears reasonable to me in view of an injury at home and also a prior injury to the back.

It is my opinion that Mr. Cobos would be quite capable of working as a winchman and probably even the front. I believe his disability would restrict him from working in the holds.

In the event cross examination is desired, this examiner would be happy to comply but would request that this be done in the form of a deposition in my office.

Relative to his complaint of headaches, a review of the records indicates he has had a long history of headaches for which he was evaluated at Kaiser on several occasions and it is my opinion that these are not industrially-incurred.

Respectfully submitted,

Charles P. Booth
CHARLES P. BOOTH, M. D.

CPB/kkw

BERNARD COOPERMAN, M.D.
A PROFESSIONAL CORPORATION
1957 PACIFIC AVENUE
LONG BEACH, CALIFORNIA 90806
TELEPHONE 591-4444

BERNARD COOPERMAN, M.D., F.A.C.S., F.A.A.O.S.
DIPLOMATE OF THE AMERICAN BOARD
OF ORTHOPAEDIC SURGERY

[illegible] 3-78

June 30, 1978

[illegible]

Metropolitan Stevedore Company
P. O. Box 547
Wilmington, California 90748

Attention Katherine Sugawara

Gentlemen:

Re: Izidor A. Viducic, #105-419
Inj: October, 1970
Claim #121-01836

The above-captioned patient was initially seen in this office March 17, 1978, at which time his history was taken. He had to be rescheduled for orthopedic evaluation this date. Following are the findings and my recommendations of that examination.

PRESENT COMPLAINTS:

1. Intermittent low back pain, with radiation to both lower extremities, and numbness and tingling of both lower extremities.

Duration of complaint: since injury of 1970.

HISTORY: (as related by patient)

In the fall of 1970, while employed by Metropolitan Stevedore as a holdman, patient was lifting 110 pound sacks and felt sudden onset of low back pain He notified his supervisor and discontinued working. The following day patient was sent to Dr. Farrington and was started on conservative therapy, approximately two times a week and lasting several months. He states that he returned to work after several months, to his regular job. His back was improved from the injury, however, he continued to have occasional flareups of back pain after vigorous activity. He worked regularly, without further loss of time, until his subsequent injury.

Patient states that sometime in 1972, while peforming work as a holdman for Crescent Wharf and Warehouse, he reinjured his back. He and a coworker were flipping 600 pound bales of cotton on end when his foot slipped in a hole and he twisted his back trying to hold onto the bale and keep himself from falling. He felt immediate pain in the low back. He reported the incident and discontinued work. He states he thinks he went directly to San Pedro Peninsula Hospital emergency room where x-rays

HISTORY: (continued)

were taken. He then started conservative treatment with Dr. Farrington, with little benefit. He subsequently received conservative treatment from Dr. Rhodes and states that eventually he felt improved enough to work.

Patient returned to light duty approximately five months after his injury, working as a marine clerk. He states that after returning to light work he continued to have intermittent, moderate back pain, about the same degree as he currently has. He lost no further time from work due to back pain. He continues in light duty to the present. He has had no further treatment since returning to work approximately five months after his injury. He denies subsequent injuries.

PREVIOUS INJURY:

Patient states that sometime in 1964, while employed by Marine Terminals as a holdman, he was using a steel crowbar to move a bundle of pipes when he felt sharp pain in the low back. He reported the incident and discontinued working. That same day he went to Dr. Farrington and was started on conservative treatment, about twice a week for about two months. He returned to his regular work duties after discontinuing treatment. He states he was improved enough to perform his regular job without loss of time but continued to have occasional flareups of pain in the back after strenuous activity. He states these flareups gradually diminished and by the time of his injury in 1970 the occasional pain had greatly decreased.

Patient denies previous pain or injury to the back other than described above.

DISABILITY:

Following his injury in 1970, patient remained off work for several months, after which time he returned to regular work. He lost no further time from work due to his back until his injury in 1972. Following the 1972 injury, patient remained off work about five months and then returned to light duty. He states he was able to work light duty, however, the light work was not always available and he estimates he loses about 400-500 hours a year in work time.

Economic loss issue?

Following the injury in 1964 (patient states that this was his lightest injury) he was off work about two months and then returned to regular work. He lost no further time from work until his injury in 1970.

Patient's regular duties as a holdman require him to work almost all of his time in the holds of ships, loading and unloading cargo. He does repetitive stooping, bending, pushing and pulling with the arms, climbing, and lifting up to 110 pounds. He operated lift-trucks and winches and jitneys. His present duties as a marine clerk involve no heavy work. He does some walking but a lot of bicycle riding while checking off

PRESENT STATUS: (continued)

cargo, taking inventory and receiving and delivering cargo.

PRESENT STATUS:

Patient is presently complaining of intermittent low back pain, with radiation pain, numbness and tingling to both lower extremities. He states he had radiation pain to left lower extremity only after the 1964 and 1970 injuries. The right lower extremity pain and numbness started only after the 1972 injury. He states that he feels the 1970 and 1972 injuries were approximately equal in severity.

Patient states that low back pain is aggravated with standing more than five minutes and walking more than 100 feet He states these are the most painful activities. Sitting causes minimal amount of discomfort, unless the pain is already aggravated. He avoids bending, stooping and squatting. He states he would not attempt to lift more than 25 pounds because of aggravation of low back pain He has increased discomfort in the evening but has noticed no change with weather.

Patient is not currently under the care of a physician. He takes no medication and does nothing at home to treat his back. He states that just prior to his 1970 injury he did a lot of work around his home and played ball, however, after the 1970 injury he was not able to do these things He feels his back has been stable since returning to work (about five months after the 1972 injury).

GENERAL MEDICAL HISTORY:

Medical:	No serious illness.
Surgical:	None.
Trauma:	None other than above.
Allergies:	None known.
Military:	None.
Employment:	Patient has been doing stevedoring work for almost 19 years, for Pacific Maritime Assn.
Familial:	Married, three children ages 14-18. Parents and one brother living and well. No known familial history of arthritis or gout.
General:	Height: 5'10" Weight: 190 pounds. Right handed.

INTERIM HISTORY:

Patient states that shortly after the above-history was taken he returned to work as a machine operator, which is slightly heavier work than that of marine clerk but still not heavy work. He operates equipment all day with his hands, no heavy lifting, pushing or pulling.

INTERIM HISTORY: (Continued)

He estimates that about 75% of the day he can work while sitting. The rest of his history remains as stated on March 17. His complaints are the same.

PHYSICAL EXAMINATION: (pertinent findings)

General:

Patient comes erect from sitting position without any difficulty.

Posture:

Posture is normal. Shoulders and iliac crests are level.

Gait:

Heel and toe gait are normal.

Squat:

Squat is normal.

Hopping:

Hopping is normal.

Lumbar Spine:

Range of motion:

Extension: 35°, with no distress. (estimated normal 35°)

Lateral bend: 30°, no distress. (estimated normal 30°)

Flexion: Outstretched fingertips reach 8" from toes, with feeling of stiffness.

Tenderness:

There is no lumbar tenderness. No gluteal or sciatic tenderness.

Special tests:

Vertical compression produces no distress.

Resisted upwards pushing with arms extended shows good strength, no distress.

Straight leg raising with patient supine is 60° bilaterally, with hamstring tightness and a feeling of stiffness.

Flexion, hyperflexion, abduction and external rotation of hips with patient supine are negative bilaterally.

There is no guarding on turning on the examination table.

Lower Extremities:

Measurements:	Right	Left
Thigh: (6" above superior patellar pole)	21-5/8"	21-3/4"
Maximum calf:	14-5/8"	14-5/8"

Neurological:

Reflexes:

Patellar and Achilles reflexes are 1+ bilaterally.

Motor:

There is no weakness of extensor hallucis longus.

Sensation:

Sensation in the lower extremities is normal.

ROENTGENOGRAMS: (taken in this office March 17, 1978)

Lumbar spine series reveals there are five lumbar vertebrae. These are normally aligned in all projections. Intervertebral spaces are substantially normal throughout the lumbar spine. The lumbosacral intervertebral space is somewhat narrowed, however, since there is no adjacent sclerosis it can be concluded that this narrowing is developmental. There is minimum osteophyte formation at a number of the lumbar segments. This is consistent with patients age. Sacroiliac joints are normal. No evidence of fracture or dislocation. No other congenital or developmental abnormalities. The acetabula are normal bilaterally.

Anteroposterior views of the lumbar spine in right and left lateral bending, as compared to neutral view, show the two lower lumbar segments bend somewhat more to the left than to the right.

DIAGNOSIS:

Lower lumbar musculoligamentous pain syndrome, chronic.

COMMENT:

It is now eight years since the first injury and six years since the second injury that this man had. Submitted records contain reports prepared in 1972. These indicate that on February 1, 1972, prior to the second injury, Mr. Viducic was examined by Dr. Farrington, with a complete examination. Dr. Farrington points out that Mr. Viducic had pain in his back and tingling sensation in the left lower extremity but that he found him quite well on examination and was at a loss to explain the persistent symtpoms and considered them to be "very minimal." Dr. Yamshon examined Mr. Viducic March 17, 1972 and suggested that the man have pelvic traction apparatus for use at home and a back support, and commented that his condition was not yet permanent and stationary even though 1½ years had elapsed since injury.

Dr. Rhorer examined Mr. Viducic September 20, 1972 and reports another injury on August 21, 1972. He thought that the latter event of August 21, 1972 "has produced at least a temporary aggravation." He recommends measures for treatment of recent aggravation. He recommends several additional weeks of temporary disability. There are no documents after September 20, 1972 to support Mr. Viducic's contention that he was disabled for five months after that.

The current examination shows Mr. Viducic to be doing quite well. This is evidenced by the fact that he has a good lumbar range of motion which is within normal limits for a person who has had a sedentary job. With exercise and conditioning this condition could probably be improved, if he cared to do so. His spine withstands stressing and loading very well; there is no atrophy and there is no indication of any nerve impairment or damage.

COMMENT: (continued)

Patient now has a relatively easy job, however, this job is one that is quite desirable and one that he is not likely to give up for a return to the work in the holds, even if the events of 1970 and 1972 had never taken place.

Based purely on the history, and on the fact that this man now recites to us symptoms of intermittent low back pain with radiation of pain into the lower extremities, I suggest that he be considered as having sustained a loss of the whole person amounting to 3% due to the injury of 1970 and 3% to the injury of 1972.

Sincerely,

Bernard Cooperman, M. D.

BC/sc

BERNARD COOPERMAN, M.D.
A PROFESSIONAL CORPORATION
1957 PACIFIC AVENUE
LONG BEACH, CALIFORNIA 90806
TELEPHONE 591-[illegible]

BERNARD COOPERMAN, M.D., F.A.C.S., F.A.A.O.S.
DIPLOMATE OF THE AMERICAN BOARD
OF ORTHOPAEDIC SURGERY

RECEIVED SEP 9 1980

August 19, 1980

Metropolitan Stevedore Company
P.O. Box 547
Wilmington, California 90748

Attention: Katherine Sugawara, Senior Claims Adjuster

Re: Izidor A. Viducic, #105-419
Inj: October 1970 and
September 26, 1978
Your File No: 121-01836

Gentlemen:

I have your letter of August 11, 1980, pointing out that Mr. Viducic misinformed me on June 30, 1978, in regard to the period of disability following the injury of the fall of 1970.

In the light of the new information that there was no period of disablement following that injury, I conclude that it is necessary to revise my estimate of permanent residual of that injury from two percent (2 %) of the whole man to one percent (1 %) of the whole man. This one percent (1 %) would reflect his statement that he continued to have occasional flare ups of back pain after vigorous activity.

Sincerely,

Bernard Cooperman, M.D.
A Professional Corporation

BC/lm

BERNARD COOPERMAN, M.D.
A PROFESSIONAL CORPORATION
1957 PACIFIC AVENUE
LONG BEACH, CALIFORNIA 90806
TELEPHONE 591-4444

ORTHOPAEDIC SURGERY

November 20, 1979

Metropolitan Stevedore Company
211 Marine Avenue
Post Office Box 547
Wilmington, California 90748

Re: Izador A. Viducic, 105-419
Inj: October, 1970 and
September 26, 1978
Claim #121-01836

Gentlemen:

The above-captioned patient was orthopaedically re-evaluated in this office today. Following are my findings and recommendations of that re-examination.

INTERIM HISTORY: (as related by patient and the submitted medical file)

Since patient was last seen here on June 30, 1978, he has not seen another doctor or received further treatment for the injury of October 1970.

On September 26, 1978, while employed as a dockman for Metropolitan Stevedore, patient was inside a container, lifting a crate weighing more than 100 pounds, when he felt immediate pain in this left shoulder and low back. He had been doing this type of lifting for some time, "even heavier than that," without any apparent difficulty. He does not know why he had onset of low back pain on this particular occasion. His employer was notified immediately. Patient does not recall if he continued working after the injury, but states it was about a half an hour before quitting time anyway..

The following day, patient was seen at San Pedro Medical Group, where he was treated for chronic recurrent musculoligamentous lumbosacral strain with bilateral sciatica. He was treated with physical therapy for about four or five months. He then went back to work, light duty, and worked for about one month when he noted increased low back pain. He then quit working and went back to physical therapy for about one or two months. The left shoulder pain soon abated.

Patient state physical therapy was only of temporary benefit.

DISABILITY:

Patient was working when last seen in this office on June 30, 1978 and continued working until the accident of September 26, 1978, Patient was then off work until January 23, 1979, at which time he returned to work, but was on light duty. He continued working then until March 5, 1979, when he noted increased pain while working. He stopped working again and was off work until May 16, 1979. Patient has been working on light duty since May 16, 1979, and has not taken any time off from work since that time due to back pain.

Patient states he is working on "light duty." He states it is "light duty" because the work he is now doing does not involve any heavy lifting. He just operates machineray, so all of his motion is in the hands and arms.

PRESENT STATUS:

Since patient was last seen in this office, he continued with slight pain of the low back "once in a great while." He also had very occasional numbness in the lower extremities, until the accident of September 26, 1978.

Since the accident of September 26, 1978, patient is complaining of constant pain of the low back which gets "from bad to worse." He states he is only able to stand for a few minutes before he feels increased back pain and numbness in the legs. Walking causes increased pain in the low back and numbness in the legs and he states he is only able to walk about one half a block. He has not been lifting, so he states he does no know whether lifting would bother the back. Bending does not bother the back, however, patient states he does not bend very far, so it is hard to tell. He states that sitting is the only way he gets "a little relief" from pain. Coldness and dampness cause slight increased back pain.

Patient states he could do more standing and walking after the examination of June 30, 1978, but prior to the accident of September 26, 1979, than he can do at present.

Patient is not currently under a doctor's care, and is taking no medication. He states that the low back pain is "almost as bad" as it was when the accident occurred on September 26, 1978.

GENERAL MEDICAL HISTORY:

Unchanged since examination of June 30, 1978.

PHYSICAL EXAMINATION: (pertinent findings)

Squat: Squat is normal with no distress.

Hop: Hop is normal with no distress.

PHYSICAL EXAMINATION: (continued)

Lumbar Spine:	
Range of Motion:	
Flexion:	Outstretched fingertips reach to within 9" of toes with a generalized feeling of stiffness.
Extension:	35° (estimated normal is 35°)
Lateral Bend:	35° bilaterally
Tenderness:	There is tenderness over the lumbosacral junction. There is no gluteal or sacroiliac tenderness.
Special Tests:	Vertical compression causes no distress. Resisted upwards pushing of arms causes slight distress in the lumbar spine. Straight leg raising is 50° on the right and 45° on the left with pain in the lumbosacral area. Flexion, abduction and external rotation of hips, with patient supine, is negative bilaterally. Hip hyperflexion, with patient supine, is negative bilaterally.
Lower Extremities:	
Measurements:	
Thigh: (6" above superior patellar pole)	21 1/2" bilaterally
Maximum Calf:	14 1/2" bilaterally
Neurological:	
Reflexes:	
Patella:	1+ bilaterally
Achilles:	1+ bilaterally
Sensation:	Sensation is normal.
Motor:	There is no weakness of the peronei or extensor hallucis longus.
Circulation:	Dorsalis pedis pulse is not palpable. Posterior tibial pulses are palpable bilaterally.

ROENTGENOGRAMS: (taken in this office today)

Six views of the lumbar spine were obtained. These again, reveal a narrowing of the lumbar spine intervertebral spaces and minor osteophyte formation. Comparison with similar views taken in the office on March 17, 1978, shows that no significant interim change has taken place. Anteroposterior views of the lumbar spine in right and left lateral bending as compared with the neutral view show that the two lower lumbar segments deviate very little to either side.

COMMENT:

When I previously examined Mr. Vicucic, he reported that he had only done light work for a number of years. Sometime after my

COMMENT: (continued)

examination, he apparently resumed heavy longshore activity. This seems to have caused a recurrence of his low back pains and necessitated a considerable period of therapy and abstention from work. Since returning to work, he has limited himself to light work.

His greatest difficulty, at this time, is the inability to walk for any significant distance due to appearnace of pain and numbness of the lower extremities. Even prolonged standing produces these symptoms, however, not as quickly. This suggests a spinal stenosis syndrome which often is a developmental abnormality which progresses as gradual degenerative changes occur in the spine. As the condition continues to progress, this man may well have to have a decompression of the spinal canal. Such surgery would be preceded by myelography and tomography, which would help decide whether the condition is developmental or due to industrial exposure.

At this time, patient's condition has plateaued and does not warrant consideration of surgery. His recitation of symptoms at this time is substantially the same as what was recorded in my examination of June 30, 1978. This included both his ability to carry out work and his ability to walk or stand. Accordingly, it is concluded that, even though he had a period of temporary exacerbation of his low back pain, this is now abated. Accordingly, he has no significant permanent residual from the event of September 26, 1978. What has been learned from that event is that he was not fit to return to unrestricted longshoring. As a consequence, it is recommended that patient continue to be restricted to the type of duties that he is currently performing.

Sincerely,

Bernard Cooperman, M.D.
A Professional Corporation

BC/jl

EARL N. FEIWELL, M.D.
RICHARD H. FIXLER, M.D.
LOUIS C. ALAIA, M.D.
STEPHEN A. WERTHEIMER, M.D.
STUART A. GREEN, M.D.
TOMOJI MIZUGUCHI, M.D.

ORTHOPAEDIC SURGERY

Reply to..... 1857 PACIFIC AVENUE
LONG BEACH, CALIFORNIA 90806
TELEPHONE 591-4444

3801 KATELLA AVENUE
LOS ALAMITOS, CALIFORNIA 90720
TELEPHONE 430-3861

August 1, 1979

Metropolitan Stevedore Company
Post Office Box 547
Wilmington, California 90748

Re: John Babich - File No.113-805
Emp: Metropolitan Stevedore Company
D/I: August 16, 1978 & January 4, 1979
Your Claim Nos. 790-0004 and 780-00162

Gentlemen:

The above-named patient was orthopaedically evaluated in this office on August 1, 1979. Following are my findings and recommendations of that examination.

PRESENT COMPLAINTS:

1. Daily frontal headaches.
2. Lump on chin at laceration site.
3. Pain in cervical spine, with radiation into the left trapezius region, intermittent.
4. Intermittent pain about the left axilla, left upper arm down to forearm to wrist, and down the front of the left anterior chest region.
5. Intermittent pain of lumbar spine (constant during the past two weeks or so, with onset of radiation into left thigh anteriorly.
6. Very occasional left ankle discomfort, laterally.

Duration of complaints: Since injuries of August 16, 1978 and January 4, 1979.

HISTORY (Per patient and submitted medical file)

On August 16, 1978, while employed as a longshoreman for Metropolitan Stevedore, he was working on board a ship and had just loaded a load of wood onto the wire sling, and as he moved away from the load he slipped and fell onto the deck of the ship; his feet slipped in some grain on the deck which made the deck slippery, and he fell onto his buttocks, and then backwards, landing on his back on the deck of the ship. He was assisted to his feet, but did not notice any immediate pain anywhere and was able to continue working out his shift, about three hours more. However, the next morning he had pain in the low back and was seen by Doctor Murphy, whose submitted report indicates a diagnosis of "lumbosacral strain". He was given some medication and advised bed rest.

HISTORY, cont'd.

Patient indicates he remained at home for three or four days and then returned to his regular work as a longshoreman, but taking easier jobs, avoiding any heavy lifting jobs, such as cotton, whenever he could do so because of continued low back discomfort, which occurred on an intermittent basis. He did not return to Doctor Murphy, and had no further medical care.

On January 4, 1979, while working as a longshoreman for Metropolitan Stevedore, he was standing on the top of a pallet in order to try and place a 2 x 6 plank into a corner so that he could stack more pallets with bales of hay when the pallet he was standing on collapsed, and he fell into the hold, feet first, a distance of some six to eight feet, landing on some pallets of hay on top of a tractor. He believes he was rendered unconscious for a few seconds. He also recalls that during the fall he had his left arm extended upwards trying to grab hold of something to stop his fall, and he scraped the metal side of the hold. When he came too, he noted blood on his chin, abrasions of the left axillary region and left side of front of chest, and pain in the back of the neck, left shoulder and in between the shoulder blades. He was helped out of the hold and taken to San Pedro & Peninsula Hospital where the laceration under his chin was cleansed and sutured. A First Report of Work Injury by Doctor Wayne King indicates "one inch laceration of chin, multiple contusions and laceration cleansed and sutured". He also had pain about the left ankle, and patient indicates X-Rays of the left ankle were taken, and also of his left anterior rib region, but "nothing was broken". He was then returned to the care of Doctors Murphy and Frie, and remained under their care for periodic observation.

Patient indicates he was at bed rest for about ten days following this accident, and that when he became a little more active he noted definite increase in pain in the low back region. He mentioned this to Doctor Frie, and was placed on therapy consisting of diathermy to the low back.

Doctor Nenadic's report (from Doctor Frie's office) of January 5, 1979 indicates "chin laceration healing well. Bruise of left upper arm and chest. Some tenderness of left ankle. Multiple abrasions and sprains of left foot". He was given Neosporin ointment for the abrasions and medication of Darvocet.

He continued under Doctor Nenadic's care and on February 21, 1979 approximately, was released to return to work, light duties. However, patient indicates no light duties were available, and he returned to his regular longshore duties in the hold.

Dated· August 1, 1979

HISTORY, cont'd.

Doctor Nenadic's report of March 6, 1979 indicates "complaining of spasm in neck - given Norgesic tablets". He indicates no permanent disability.

He has remained under the care of Doctor Frie's office to the present time. He indicates that he did receive five days of therapy last week because of increase in low back pain without known cause, and was also given some medication, which he thinks is codeine, and which has been making him very drowsy, but has helped his discomfort somewhat. He has a return appointment to see Doctor Frie on August 3, 1979.

He was evaluated by Doctor Harvey Dannis in May, 1979, whose submitted report indicates impression of "chronic musculoligamentous cervical and thoracic strain with recurrent headache. Chronic musculoligamentous lumbosacral strain. Contusion left anterior chest with sequelae". He felt patient's condition was permanent and stationary, and that he should not perform very heavy work. He felt there was a sixteen percent (16%) permanent partial impairment of the individual as a whole. His back was apportioned forty percent (40%) to the August 16, 1978 injury, and sixty percent (60%) to the January 4, 1979 episode.

DISABILITY:

Patient, following the first injury in August, 1978, was off work for three or four days and then returned to his regular duties as a longshoreman for Metropolitan Stevedore. He indicates however, that he continued with low back discomfort on an intermittent basis, and missed a total of about two or three weeks up until the time of the second injury on January 4, 1979.

Following the second injury on January 4, 1979, he was off work until approximately February 19, 1979, when he again returned to work, supposedly light duties, but no such duty was available and he again returned to hold work, his regular longshore duties. However, since returning to work he believes he has missed a total of about two and one-half to three weeks of work because, primarily, his low back pain, followed by his neck discomfort.

He states that his regular work as a longshoreman is primarily hold work and driving the jitney and forklifts. He tries to avoid picking jobs at the present time which involve driving the jitney and the forklift as the sitting in a slightly bent forward position for his eight hour shift increases his low back pain and causes onset of stiffness in the low back.

DISABILITY, cont'd.

Patient states he tries to take jobs where he can be standing up and moving around. He does hold work which involves working down in the hold, and he avoids taking any jobs in the hold which will involve any heavy lifting or a lot of repetitive bending. He states he takes the jobs which involve hooking up the loads in the hold and which is the easiest work for him.

Patient states that prior to the second injury and following the first injury he did his regular job and did not avoid taking any of the heavy hold work, but following the second injury he has avoided doing any heavy jobs. He indicates that he could lift repetitively up to one hundred pounds or more prior to the two injuries noted above.

PRESENT STATUS:

Patient states that following the first injury in August, 1978 he did not have any pain other than in the low back. He did not have any radiation of pain into the lower extremities.

Following the second injury in January, 1979, he noted definite increase in low back pain and onset of neck pain, the chin laceration, pain about the left axilla and left anterior chest region, as well as pain in the left upper arm and in between the shoulder blades. Left ankle pain was also noted following the January, 1979 injury.

Patient continues intermittently with back of neck pain, with pain about the left side of the neck and radiation into the left trapezius region. He indicates that every month or two, without known cause or injury, he has increased back of neck pain with stiffness which lasts for about two weeks or so and then subsides back to pre-exacerbation status. He has never worn a cervical collar.

He has no inrease in back of neck discomfort on flexion or extension of the head, but has definite pain when he turns to the left.

Since the second injury in January, 1979 he has had daily headaches which start about the frontal region on both right and left sides and which remain with him until he can go home, take a pain pill and go to sleep. Headaches occur mainly in the afternoon. There is no nausea, blurringof vision or dizziness with the headaches.

Patient is right handed. He indicates no pain whatsoever in the right upper extremity, and he does not feel he has had any grip loss in either hand.

There is no numbness noted in the upper extremities.

PRESENT STATUS, cont'd.

Patient states he notes a little lump about the laceration of the chin, whcih is somewhat sore on squeezing it.

He continues with intermittent pain about the left axillary region and left upper anterior chest region, present since the second accident in January, 1979, which occurs approximately once every week or two weeks, and without known cause. When it does occur, the pain will radiate into the left upper arm and down into the forearm to the wrist; it does not include the hand or the fingers. It lasts for about one and one-half days and then subsides until the next time. He does note some discomfort about the left axilla and left upper anterior chest region when he raises the left arm above shoulder height, but there is no pain or discomfort about the left shoulder itself.

He notes some "lumps" under the left axillary region, present since about ten days after the second injury in January, 1979.

He has no particular discomfort between the shoulder blades, and no discomfort in this area on rotational movements of the body.

He continues with intermittent pain about the waist level region of the low back which comes and goes in severity; he indicates that at times the pain will subside to the point it was at just prior to the second injury in January, 1979, and then, without known cause, will increase to the point that he can "hardly stand it", and this exacerbation will usually last about ten days or so; however, about two weeks ago, without known cause or injury, pain in the waist level region of the low back increased and has remained increased to the present time and has been constant in nature. In addition, he has had radiation of pain down the anterior left thigh to the knee, not present previously. He states he had five therapy treatments last week which have temporarily "softened the pain".

Sitting is presently limited to half an hour or so, and during this period of time he shifts about in the chair constantly.

He feels that he could walk about two or three blocks, but would probably then have to rest for a short period.

Bending over increases his back pain, and he avoids this position.

Cold weather is not particularly annoying to him and he prefers it to the warm weather. He does not do refrigeration or freezer work because of an injury to the right middle finger which he smashed in about 1967 when working as a longshoreman and it got "mixed up with a hook and a load".

He has never worn a back support.

Dated: August 1, 1979

PRESENT STATUS, cont'd.

Patient states that prior to the first injury in August, 1978, he could lift one hundred pound repetitively and without any problems, discomfort or pain in any area of his body; following the injury in August, 1978 he avoided lifting anything heavy, and, when asked, he considers anything over seventyfive pounds heavy. Following the second injury in January, 1979 he has avoided lifting altogether, and believes he could lift about thirtyfive pounds now if he had to do so. He subsequently indicates he could lift at least one hundred pounds now, but following this would be very stiff and in a lot more pain the next day as far as his low back is concerned.

He feels that the second injury in January, 1979 increased his low back pain by about fifty percent.

He has occasional discomfort about the lateral left ankle region, but when asked about this and when the discomfort occurs, he states "it is nothing - I never mention it because it is nothing; it was swollen at the time of the injury (January, 1979) they took X-Rays and nothing broken, so I think no more about it".

Patient denies pain, injury or discomfort in the neck, left upper extremity, left chest, low back, left lower extremity or left ankle prior to August, 1978.

GENERAL MEDICAL HISTORY:

Medical:	General health statedly good.
Surgical:	None.
Trauma:	None, other than noted above.
Allergies:	None known.
Military:	No service.
Familial:	Patient is 41 years old, married, with two children at home. No known familial history of arthritis.
Employment:	With Pacific Maritime Association as a longshoreman for about ten years. He works out of the Union Hall.
General:	Patient is 6' 2" tall, weighs about 190 pounds, and is right dominant.

PHYSICAL EXAMINATION (Pertinent findings)

Patient indicates the low back, the cervical area, the left axilla and forehead area as sites of discomfort. He also indicates the lateral thigh and anterolateral left ankle region.

CERVICAL SPINE:

Range of Motion:

Flexion:	45°, with chin touching sternum.
Extension:	65°.
Lateral Tilt:	10° right // 10° left, with grimacing.
Rotation:	25° right // 25° left, with grimacing.

There is no spasm on cervical motion.

Date: August 1, 1979

CERVICAL SPINE, cont'd.

Tenderness:
There is no tenderness of the cervical spine.

UPPER EXTREMITIES:

Shoulder Range of Motion:
Abduction: 180° right // 180° left.
Forward flexion: 180° right // 180° left.
External rotation: 25° right // 25° left.
Internal rotation: 75° right // 75° left.

Elbow Range of Motion:
Flexion: 135° right // 135° left.
Extension: 0° right // 0° left.

Forearm Range of Motion:
Supination: 80° right // 80° left.
Pronation: 80° right // 80° left.

Wrist Range of Motion:
Flexion: 45° right // 45° left.
Extension: 75° right // 75° left.

Finger Range of Motion:
Finger range of motion is full bilaterally.

Measurements:	(Major) Right.	Left.
Upper arm:	13 1/2"	13"
Forearm:	11 1/4"	11"

Hand Grip - Per Jamar Adjustable Dynamometer:

104/98/92 Right Major // 75/82/86 Left.

Neurological:
Reflexes:
Biceps, triceps and brachioradialis are 1+ bilaterally.

Sensory:
Sensation is intact in both upper extremities.

Motor Strength:
Motor is intact in both upper extremities.

Circulatory:
Radial pulses are intact bilaterally.

AXILLAE:

On palpation of the axillae, shotty adenopathy is found bilaterally. There is no other abnormality.

FACE:

There is a 1/2" laceration scar, healed, in the submental area of the chin. An older laceration scar, 1/4", is present about the tip of the chin, which patient thinks may be due to an old childhood injury.

LUMBAR SPINE:

Posture:
Stance is normal. Shoulders and pelvis are level.

Gait:
Gait is symmetrical. Heel and toe gait normal bialterally.

Squat:
Squat is performed fifty percent (50%) with pain in the low back.

Range of Motion:
Flexion: On forward flexion, outstretched fingertips reach to 4" off floor, with good reversal of lumbar curve.
Extension: 30°.
Lateral Bend: 30° right // 30° left.

There is no complaint of discomfort on lumbar motions, and no spasm on lumbar motions.

Special Tests:
Straight leg raising, with the patient supine, is 45° right // 45° left, with considerable pain behaviour bilaterally.

In the sitting position, straight leg raising, with attention distracted to feet, is 90° right // 90° left, without evidence of discomfort.

Tenderness:
On initial palpation for tenderness of the lower back, no tenderness is elicited. On persistence, the patient suddenly gives the pain location and states it is tender in the lower lumbar area, posterior midline.

Dated: gust 1, 1979

HIPS:

Range of Motion:
Extension: 0° right // 0° left.
Flexion: 90° right // 90° left, with pain behaviour bilaterally.
External rotation: 30° right // 30° left.
Internal rotation: 20° right // 20° left.

LOWER EXTREMITIES: (LEFT ANKLE)

Inspection:
There is no tenderness, no swelling and no increased warmth of ankles bilaterally.

Ankle Range of Motion:
Extension: 45° right // 45° left.
Flexion: 25° right // 25° left.

Subtalar Range of Motion:
Eversion: 0° right // 0° left.
Inversion: 40° right // 40° left.

Measurements:	Right.	Left.
Thigh-4" above superior patellar pole	17 5/8"	17 5/8"
Calf	14 5/8"	14 5/8"
Leg lengths, by inspection	Bilaterally equal.	

Neurological:
Reflexes:
Knee jerks 1+ bilaterally. Ankle jerks 2+ bilaterally.

Sensory:
Sensation intact in both lower extremities.

Motor Strength:
Motor intact in both lower extremities.

ROENTGENOGRAMS:

Cervical spine series, including anteroposterior, lateral in flexion, extension and neutral position, right and left oblique views, as well as anteroposterior view of the odontoid process reveal minimal spurring is noted at C5-6 level. No other abnormality is seen.

Lumbar spine series, including anteroposterior, lateral and oblique views, as well as coned-lateral and angulated anteroposterior view of the lumbosacral area, and anteroposterior view of the lumbar spine in right and left lateral bending as compared to the neutral position reveal mild spurring is noted of the last two lumbar vertebrae, and in several lower dorsal vertebrae. There appears to be a mild spina bifida occulta of the S1 segment. Slight narrowing at lumbosacral is noted. No other abnormality is seen.

ROENTGENOGRAMS, cont'd.

Three views of left ankle reveal no abnormality is seen.

Two views of the left rib cage reveal no abnormality is seen.

DIAGNOSES:

1. Strain of cervical and lumbar spine.
2. Strain of left ankle.
3. Laceration of chin, mild.

COMMENT:

Mr. Babich's history and submitted medical file were reviewed. The patient was orthopaedically evaluated, and appropriate office X-Rays were taken and evaluated.

This man was involved in two industrial injuries. In the accident of August 16, 1978, he sustained a strain of the low back. In the accident of January 4, 1979, he aggravated his low back strain, and sustained contusions, a slight submental laceration, and a strain of the cervical spine.

Physical examination of the injured areas is within normal limits, except for the presence of a number of signs, on examination, which indicate functional overlay, or exaggeration, or a combination thereof.

The patient's symptomatic complaints are greater than can be justified on a medical basis. This discrepancy may be due to the functional overlay, or exaggeration, as noted above.

Mr. Babich's condition is permanent and stationary. Subjective factors, which would be reasonable for the injuries sustained, are rated intermittently minimal.

Objective factors are: slight laceration scar, submental area.

Mr. Babich has X-Ray evidence of mild degenerative changes in the cervical, dorsal and lumbar spine; these changes are considered to have pre-existed the injuries under discussion, and were not caused by these injuries.

No further treatment is indicated for these conditions.

There are no work restrictions related to these conditions.

Dated. August 1, 1979

COMMENT, cont'd.

The residuals of the two industrial injuries should be apportioned forty percent (40%) to the accident of August 16, 1978, and sixty percent (60%) to the accident of January 4, 1979.

With regard to percentage of disability, there is no ratable disability, caused by the two industrial accidents.

Sincerely,

Richard H. Fixler MD

Richard H. Fixler, M.D.

RHF:ij

LAW OFFICES
JOHN A. MARIN
A PROFESSIONAL LAW CORPORATION

John A. Marin
Anthony J. Battaglia
Charles D. Naylor
Charles C. Ryan

HARBOR OFFICE
522 NORTH AVALON BOULEVARD
WILMINGTON, CALIFORNIA 90744
AREA CODE 213 830-7121
775 3515

SAN DIEGO OFFICE
1268 KETTNER BOULEVARD
SAN DIEGO CALIFORNIA 92101
AREA CODE 714 232-6431

PLEASE REPLY TO:
Harbor Office

February 25, 1981

Mr. Barry F. Evans, Esq.
EVANS, DALBEY & CUMMING
1717 N. Highland Ave.
Suite 710
Los Angeles, CA 90028

Re: PHILIP VLAIC v. METROPOLITAN STEVEDORE CO., INC.
OWCP #: 18-35-5
D/I: 12-20-79

Dear Mr. Evans:

Thank you for your letter of February 13, 1981. I find your position most interesting and one that would be most precarious before an A.L.J.

Please note Mr. Vlaic's hours for the years 1973 to 1978:

	Year	Hours
	1973	1568
(Year of injury)	1974	1911
	1975	1797
	1976	1709
	1977	1877
	1978	2035

Since Mr. Vlaic was injured 1-15-74, the 1911 hours he worked provides a significant hurdle for your 8(f) defense. Here is a man who worked 1568 hours the year before his injury and then worked 1911 hours the year after. Although, this is the position you generally tell this office, it is one you seemed to have forgotten.

Still further, the disposition of Mr. Vlaic's 1974 injury must be noted.

I read the LS-208 to state no permanent partial disability was awarded. It would now be a significant switch by Metropolitan to tell an A.L.J. that although no permanent partial disability was awarded, there actually was a 4% impairment to the individual. This, of course, would be the position you would have to take if you are to claim 8(f) relief on the basis of the Cooperman report.

Please again be advised our demand remains unchanged. Please inform your principal of this letter and its contents. At this time, it is our intention to go to an A.L.J. hearing if we are forced to go through with our requested informal conference.

Sincerely,

ROBERT W. NIZICH

RWN/nsv

RECEIVED SEP 2 5 1980

RICHARD H. FIXLER, M. D.
STEPHEN A. WERTHEIMER, M. D.
STUART A. GREEN, M. D.
TOMOJI MIZUGUCHI, M. D.
HARRY MARINOW, M. D.

ORTHOPAEDIC SURGERY

Reply to: 1957 PACIFIC AVENUE
LONG BEACH, CALIFORNIA 90806
TELEPHONE (213) 591-4444

3801 KATELLA AVENUE
LOS ALAMITOS, CALIFORNIA 90720
TELEPHONE (213) 430-3581

September 17, 1980

James R. Callahan
Compensation Claims Manager
Metropolitan Stevedore Company
211 Marine Avenue
P.O. Box 547
Wilmington, CA 90748

Re: Phillip Vlaic, Jr. - #104, 637
Emp: Metropolitan Stevedore Company
D/I: December 10, 1979
Your File No: 790-00187

Dear Mr. Callahan:

Thank you for your letter of August 15, 1980, in regard to Mr. Phillip Vlaic.

As has been previously noted, the patient had been returned to regular work duty with the restriction that he should not participate in prolonged lifting, forward bending, repetitive flexion and rotation of the lower spine, stooping or crouching.

His low back injury of December 10, 1979, is consistent with evidence of left L5 neuropathy and the objective findings are consistent with this including slight hypesthesia of the dorsal aspect of the left great toe and slight weakness in motor strength of the left toe extensors. There is also slight decrease in full range of motion and evidence of one-fourth inch left calf atrophy.

Subjectively, he had complaint of low back pain with intermittent radiation into the left lower extremity.

His percentage of impairment of the whole man in relationship to this low back injury can be rated at seven to eight percent. He is capable of working regular duty with restrictions and his work activities should be limited to those requiring no prolonged bending, forward flexion with rotation of the lower spine, stooping or lifting. If other work categories for longshoremen, besides the front line, which fit into these work restrictions exist, then this patient would certainly be able to undertake them, keeping in mind the restrictions which have been advised to preclude a re-injury of his low back.

Provision should be made for further medical care and physical therapy, as necessary, if exacerbations of low back pain or re-injury occur.

As noted before, this patient's condition is permanent and stationary.

If I may be of any further assistance, please feel free to contact me.

Respectfully yours,

Harry Marinow, M.D.

HM/bs

BERNARD COOPERMAN, M.D.
A PROFESSIONAL CORPORATION
1957 PACIFIC AVENUE
LONG BEACH, CALIFORNIA 90806
TELEPHONE 591-4444

BERNARD COOPERMAN, M.D., F.A.C.S., F.A.A.O.S.
DIPLOMATE OF THE AMERICAN BOARD
OF ORTHOPAEDIC SURGERY

November 13, 1980

OWCP # 18-3505

Metropolitan Stevedore Company
211 Marine Avenue
Wilmington, CA 90748

Re: Philip Vlaic
Our No: 104-637
D/I: December 10, 1979
Your No: 790-00187

Gentlemen:

The above-named patient was orthopaedically re-evaluated in this office today. Following are my findings and recommendations of that examination.

PRESENT COMPLAINTS:

1. Intermittent low back pain.
2. Intermittent pain, right side of left foot.
3. Intermittent numbness of big toe, left foot.

INTERIM HISTORY:

Since patient was seen in this office on August 1, 1980, patient feels he is improving. He states home exercises for the low back are of benefit. He takes Robaxin occasionally, one tablet about once a week. Patient is working regular duty from the 'dock board'.

He attended a six-week class at the YMCA from September 29, 1980, to November 6, 1980, The Wise Way to a Healthy Back. This course consisted of a total of eighteen exercises and he feels the course was beneficial.

He has seen no other doctors since August 1, 1980.

DISABILITY:

Patient has been working regular duty on the 'dock board' since August 1, 1980. He states he chooses his work and does not take jobs that would be strenuous to his back. He works four or five days per week and states that about twice a week after the eight-hour shift, he feels back discomfort, stiffness and soreness.

PRESENT STATUS:

Sitting for a prolonged preiod, over one hour, causes a stiff sore feeling. Walking does not cause discomfort. Standing does not cause pain. He is able to lift 50 or 60 pounds occasionally without discomfort. Repeated

PRESENT STATUS: (Continued)

lifting causes pain. Twisting and turning causes occasional pain. Climbing stairs does not cause pain. He is able to bend or stoop for five minutes without increase of pain in low back. Coldness does not cause pain nor coughing or sneezing.

Walking on occasion, twice a week, causes pain in the left foot. Standing does not increase pain. Moving as in dancing for fifteen minutes increases pain. Climbing on an incline increases pain. After five minutes, squatting increases pain and coldness and dampness increases left foot pain.

Since being examined by me in January, patient states his condition has improved. He states since he was treated by Dr. Marinow that improvement in his condition was noted. He feels the home exercises and the YMCA course of exercises were of benefit.

He has had no illness or injury since August 1, 1980.

PHYSICAL EXAMINATION: (Pertinent Findings)

General:

There is slight guarding in turning on examination table.

Gait:

Gait is normal. Patient walks on heels and toes normally.

Squat:

Patient is able to squat normally.

Lumbar Spine:

Range of Motion:

Flexion:	On forward flexion, outstretched fingertips reach within 12" of the floor with reversal lumbar lordosis, no distress. (Estimated normal 8")	
Extension:	10° (Estimated normal 20°)	Apparent mechanical block - no spasm.
Lateral Bend:	10° bilaterally, with slight distress (Estimated normal 20°)	

Special Tests:

Straight leg raising, with patient sitting, 75° bilaterally.

Straight leg raising, with patient supine, is 45° bilaterally with tight hamstrings, no lumbar distress.

Flexion, hyperflexion, abduction and external rotation of hips, with patient supine, produce slight distress at extreme bilaterally.

Hip hyperflexion, with patient supine, produces slight distress at extreme bilaterally.

Vertical compression produces no distress.

Resisted upward pushing with extended arms and other resisted shoulder motion shows good strength with no distress.

PHYSICAL EXAMINATION: (Continued)

Lower Extremities:

Measurements:	Right	Left
Thigh: (6" above superior patellar pole)	24½"	24"
Maximum Calf:	16-3/4"	17"

Neurological:

Reflexes:

Patellar: 1+ bilaterally.

Achilles: 1+ right // Zero left.

Sensation:

Sensation is normal.

Motor:

There is slight weakness of the extensor hallucis longus on the left.

ROENTGENOGRAMS:

X-rays taken in this office today, 5 views of lumbar spine, anteroposterior lateral of the lumbar spine, when compared with x-rays taken previously, show no interim change. Anteroposterior views of the lumbar spine in right and left lateral bending, as compared with the neutral view, show no motion of the two lumbar vertebrae to the left and some motion to the right.

COMMENT:

All indications are that this man's condition with regard to the low back injury of December 10, 1979, has undergone maximum improvement and that it can be presented for a permanent disability rating. He has been working with some restrictions and has done quite well.

The past history in this case is significant. Patient had a documented low back injury in 1974. I have been forwarded a report by Doctor Rhodes, dated February 23, 1977. This represents a late evaluation of the effects of that injury. Doctor Rhodes concludes that patient has a chronic low back sprain syndrome on the basis of residual intervertebral disc herniation at L4-5 and L5-S1. Doctor Rhodes further states that he anticipates that patient will be subject to recurrent low back aching discomfort on heavy lifting.

Doctor Rhodes' prediction has been borne out by subsequent events. I consider that the event of December 10, 1979, constitutes such recurrence. That is, patient was doing some of the heavier duties of longshoring, and in the course of that, experienced an exacerbation of these pre-existing conditions. Inasmuch as he developed a neuropathy with loss of ankle jerk on this occasion, it must be concluded that there is, in connection with the December 10, 1979, exposure, a permanent partial aggravation of the condition. Doctor Rhodes, in his 1977 report, did not specify the exact range of lumbar motion that he

COMMENT: (Continued)

found. He simply says, "There was a full range of lumbar motion without complaint." Accordingly, today, we have to resort to estimated normal. Using such estimated normal, I calculate that this man's permanent loss of lumbar mobility amounts to 4% of the whole person. Additional to this, should be added the 4% of the whole person for loss of lifting capacity on a prophylactic basis, making a total of 8% loss of low back function as applied to the person as a whole.

As explained above, this man had a pre-existing permanent partial disability. Judging from his statements, and the report by Doctor Rhodes in 1977, I conclude that this man's pre-existing impairment of the lumbar spine amounting to 5% of the whole person, whereas the aggravation of December 10, 1979 amounted to 3% of the whole person, making a total of 8%. It should further be noted that the likelihood of any injury or aggravation occurring on December 10, 1979 is very low indeed, if it had not been for the pre-existing weakness and impairment in the back. Accordingly, it is concluded that this man had a pre-existing permanent partial disability of the low back and that this materially and substantially contributed to the seriousness of the injury of December 10, 1979.

Sincerely,

Bernard Cooperman, M.D.
A Professional Corporation

BC:jo

Law Offices
NEWTON R. BROWN

404 North Avalon Boulevard - Wilmington, California 90744
(213) 830-8880 / 775-2010

May 13, 1981

TO WHOM IT MAY CONCERN:

Subject: Practice Under the Longshoremen and Harbor Workers' Compensation Act

Please be advised that my name is Newton R. Brown, and I am an attorney specializing in maritime law. I have been handling workers' compensation cases under the Longshoremen and Harbor Workers' Compensation Act since 1960, and I am thoroughly familiar with the practices in the Los Angeles Harbor with respect to such cases. I have further had experience in the handling of longshore cases in the Ports of San Diego, Port Hueneme, San Francisco, Eureka, Portland and Seattle.

With respect to the handling of cases in the Los Angeles Harbor, it has been my experience as to the following subjects:

Change of Physicians: In the cases I have handled, a change of doctors is required in approximately one out of every ten cases. The reason the change is suggested is that the doctor obtained by the claimant is either unfamiliar with rating under the Longshoremen and Harbor Workers' Compensation Act or does not have the reputation for furnishing the best care under the circumstances. I consider my obligation as an injured claimant's attorney to obtain the best possible care for my client, and when I feel that the doctor whom he has chosen will not provide him that care, I exercise my rights under the Act and the regulations to obtain a change of treating physicians. (20 CFR 702.406)

In many instances I will discuss a change of physicians with the employer, however, where I disagree with the employer, I have had occasion to discuss the matter with the office of the OWCP. It has been my experience that I must justify change of physicians with the OWCP and the change of physicians has not been automatically approved. Before I may obtain a change of physicians with the approval of the OWCP, I must present sufficient reasons, such as the original choice of physicians is not familiar with the Longshore Act, is not a specialist in the area of my client's injuries, or in the past has demonstrated lack of suitability to handle this type of case.

The doctors whom I select do not overtreat my claimants. I have had occasion to use San Pedro Medical Group, whom I find are excellent in the following respects:

(a) They can see my injured claimant immediately;

(b) The reports are forthcoming on a regular basis;

(c) They are familiar with the rating system under the Act;

(d) They contain sufficient medical personnel to handle any of the neurological or orthopedic problems of my claimants.

I am thoroughly satisfied with their handling of my claimants, and I have no evidence that they either "over treat" or over charge for their services.

My standing orders with any doctor to whom I send my claimant is to provide all necessary care and treatment to effectuate as complete a cure as possible under the circumstances, and when he is released to work, he is not released in such a condition as will render him susceptible to further and additional injury because of early release.

I find the San Pedro Medical Group, Bayport Medical Group, Dr. Vincent Oriente and Dr. Jordan Rhodes are thoroughly familiar with rating under the Act and rate properly under the circumstances.

My experience with the local office of the OWCP is that they are doing an excellent job with respect to the medical management of injured longshoremen. My experience has been that they do not automatically approve changes of treating physician, nor extensions of temporary disability. In the cases I have handled before the OWCP, I must justify such requests.

With respect to treatment provided by the treating doctors, it has been my experience that the OWCP wisely generally relies upon the treating doctor with respect to the type of medical care and treatment to be rendered to the employee, which, as I understand, conforms to the intent of the Act.

My sole experience with respect to a claim for excessive fees on the part of a treating physician has been on the part of Dr. Vincent Oriente, which fee controversy was handled, in my opinion, quite competently by the local OWCP office.

With respect to medical conflicts being resolved by the local OWCP in favor of injured employees, it has been my experience that the OWCP has been impartial, at least in my cases. I have tried a substantial number of cases before the Administrative Law Judge because I felt the recommendation of the OWCP were less than what the claimant would have been entitled to under the Act. As an example, enclosed please find recommendations of the Department of Labor on Mel Bluhm, indicating a 12% loss of the lower extremity, and the findings of the Administrative Law Judge that the claimant has demonstrated a 25% loss of wage earning capacity. This is but an example of the local OWCP finding less than the actual disability sustained by the claimant.*

It has been my further opinion that the employers in this port have consistently sought out medical examiners who are less than sympathetic to the longshoremen, and have consistently refused to find permanent disability where permanent disability exists. I am enclosing three reports by Dr. Peter Lorman dated April 30 and April 28, 1981, which, in my opinion, make findings significantly less than the disability experienced by the longshoreman. It is my experience that "washout" doctors are employed regularly by the employers in this port, who perform perfunctory examinations and continually render reports indicating disability less than that actually experienced by the claimant. I feel this frustrates the intent of the Act to honestly find the percent of disability of the claimant and to compensate him as a result thereof.

Very truly yours,

NEWTON R. BROWN

---

*Since the Bluhm decision, the law has changed with respect to scheduled disabilities, however, the principle that the OWCP was less than the finding of the Administrative Law Judge is applicable.

PETER S. LORMAN, M.D
A PROFESSIONAL CORPORATION
PALOS VERDES MEDICAL CENTER SUITE 244
927 DEEP VALLEY DRIVE
ROLLING HILLS ESTATES, CALIFORNIA 90274
TELEPHONE (213) 377-0353

FELLOW OF THE AMERICAN BOARD
OF ORTHOPAEDIC SURGERY

FELLOW OF THE AMERICAN
COLLEGE OF SURGEONS

April 28, 1981

Excel #
Unassigned
Brown, Esq

Marine Terminals Corporation
P.O. Box 1068
Long Beach, CA 90801

Attention: Dorothy L. Neal, Claims Assistant

RE: Employee: Larry Glusac
Employer: Marine Terminals
D/I: 1-27-81

Dear Ms. Neal:

At your request, Mr. Larry Glusac was orthopaedically evaluated in this office on April 28, 1981. The following is a report of my initial evaluation and recommendations as of that date.

CHIEF COMPLAINT:
1. Neck pain.
2. Low back pain.

HISTORY OF PRESENT ILLNESS: The patient is a 33 year old male, employed as a longshoreman. He dates the onset of todays presenting problem to 1-27-81. On that date, while in the employment of the Marine Terminals and while working on the deck of a ship, the patient apparently slipped and fell to the deck and in doing so injured both his neck as well as his low back. The incident was reported to the patient's supervisor and on the day of the injury the patient was seen at the San Pedro Medical Group. From January 27, 1981 until 4-20-81 the patient has been receiving daily hot packs and traction. There has been no other care rendered and the patient has not seen any other physician.

When questioned specifically about his symptomatology at this time, the patient states the following:

1. NECK PAIN: The patient complains of pain in the area of the lower cervical spine. He states the pain radiates up to, but not beyond, the base of the skull. The patient denies dizziness, diplopia, or syncope.

RECEIVED
MAY 11 1981
MARINE TERMINALS CORP.
OF LOS ANGELES —

2. LOW BACK PAIN: The patient complains of pain in the area of the thoracolumbar spine. Here again, the pain is localized to the spine without radicular signs or symptoms. The patient denies numbness or weakness in the extremities. He states the pain is not affected by coughing or sneezing.

PAST HISTORY: The patient denies neck or back injury prior to 1-27-81. He states that, aside from the presenting problem, he has been enjoying excellent health.

PAST SURGICAL HISTORY: Negative.

PAST MEDICAL HISTORY: Negative.

PRESENT MEDICATIONS: None.

WORK HISTORY: The patient has been employed as a longshoreman for a 12 year period of time. He has been unable to carry out work activities since the time of his injury.

NECK EXAMINATION: See enclosed sheet.

BACK EXAMINATION: See enclosed sheet.

X-RAYS: The patient refuses to have x-rays of his spine taken at this time.

RECORD REVIEW: The patient's medical records have been reviewed in toto. This consists of records from the San Pedro Medical Group.

The history is essentially as stated by the San Pedro Medical Group. In the records the doctors noted that the patient injured his back 10 years ago and was on disability for a three week period of time. This was not related to us by the patient today. On physical examination, the doctor noted some limitation of neck motion, however, this examination was carried out three months ago. The doctor noted a normal neurologic evaluation with normal x-rays. The patient was diagnosed as having multiple strains and sprains. The patient was placed on disability and it was felt that he had a guarded prognosis.

There is a nerve conduction study carried out by Dr. Steven Levy dated 2-25-81 which was reported to be abnormal. There is an EMG study carried out by Dr. Levy which was also noted to be abnormal.

Further follow-up reports by Dr. Hall show that the patient's symptoms persisted.

RECORD REVIEW (CONTINUED): An EEG was performed which was noted to be normal. The last report from Dr. Hall dated 3-20-81, the patient's symptoms persisted and his disability was extended.

COMMENT: At the time of todays office visit, aside from a multitude of subjective complaints, we find very little in the way of true objective pathology. We do not have the benefit of x-rays but we would assume that they are negative, considering our examination and considering the initial report from the San Pedro Medical Group.

As far as the abnormal nerve conduction study and EMG study, we can place very little credence in this based upon todays examinatic We further note that the patient has had daily hot packs for a three month period of time and, certainly if these have not relieve the patient's subjective complaints, it is felt that the further application of hot packs would not serve any useful purpose.

Considering the normal examination at the time of todays office visit as well as considering the more than adequate treatment program the patient has had to date, it is felt that any further treatment would not serve the patient any useful purpose and for rating purposes we could safely assume that Mr. Larry Glusac has arrived at a permanent stationary status with regards to his 1-27-81 industrial injury.

According to the criteria established by the AMA in evaluating permanent impairment, we feel that as a result of the 1-27-81 injury the patient has sustained a 1% damage to the individual as a whole as a result of the injury.

Further hot packs are not indicated at this time. Based upon todays examination, we would clear the patient to return to work as of the time of todays office visit and carry them out on a full-time basis without limitations.

Very truly yours,

Peter S. Lorman, M.D.

PSL:mg
Enclosures - 2

NOTE: Medical records being returned under separate cover.

PETER S. LORMAN, M.D.
A PROFESSIONAL CORPORATION
PALOS VERDES MEDICAL CENTER SUITE 244
927 DEEP VALLEY DRIVE
ROLLING HILLS ESTATES, CALIFORNIA 90274
TELEPHONE (213) 377-0353

FELLOW OF THE AMERICAN BOARD
OF ORTHOPAEDIC SURGERY

FELLOW OF THE AMERICAN
COLLEGE OF SURGEONS

April 30, 1981

OWCP # unassigned

Marine Terminals Corporation
P.O, Box 1068
Long Beach, CA 90801

Attention: Dorothy L. Neal, Claims Assistant

RE: Employee: George Fimbres
Employer: Marine Terminals
D/I: 3-6-81

Dear Ms. Neal:

At your request, Mr. George Fimbres was orthopaedically evaluated in this office on April 30, 1981. The following is a report of my initial evaluation and recommendations as of that date.

CHIEF COMPLAINT: Status post injury, left index finger.

HISTORY OF PRESENT ILLNESS: The patient is a 35 year old right-handed male, employed as a longshoreman. He states that on 3-6-81 while in the employment of the Marine Terminals and while carrying out his usual and customary work assignments, he slipped while ascending some stairs, fell to the ground, and landed on his outstretched left hand. He developed immediate pain in the left index finger following the injury and was seen in the emergency room of the Long Beach Memorial Hospital on that date. Apparently a splint was applied to the finger with the patient being discharged from the hospital on that date.

Review of a first report of work injury describes the patient as landing on his outstretched finger on 3-6-81 while aboard the S.S. President Jackson.

The patient was subsequently referred to the office of a Dr. Jazayeri on March 9, 1981. The doctor's report has been enclosed for our review. He noted a fracture of the proximal phalanx of the right index finger and applied a short-arm cast.

RECEIVED
MAY 11 1981
MARINE TERMINALS CORP.

Dr. Jazayeri felt that the patient would require a 4-6 week period of disability.

The patient's attorney subsequently referred him to the San Pedro Medical Group where he came under the care of a Dr. Hall. Dr. Hall's report dated 3-21-81 has been reviewed. The history is essentially as stated by Dr. Hall. Dr. Hall noted that the patient had a comminuted spiral fracture to the proximal phalanx of the left index finger. He felt that the fracture fragments were in an excellent position and he felt that the patient required medical care. He felt that there would be at least an 8 week period of disability.

According to Mr. Fimbres, he has remained under the care of Dr. Hall and, after an initial period of immobilization, the patient was placed on physical therapy and has been receiving whirlpool treatments to the finger three times per week.

TODAYS OFFICE VISIT: When questioned specifically about his finger symptomatology, the patient complains of some weakness and limitation of motion of the left index finger. He denies numbness of the finger, per se.

Aside from the above-noted problem, the patient states that he is enjoying excellent health. He denies prior injury to the left index finger.

PAST SURGICAL HISTORY: Negative.

PRESENT MEDICAL HISTORY: Negative.

PRESENT MEDICATIONS: None.

WORK HISTORY: The patient has been employed as a longshoreman for an 11 year period of time. He has been unable to carry out work activities since the time of his injury.

PHYSICAL EXAM - LEFT INDEX FINGER:

General:	There is no evidence of swelling or infection of the left index finger.
Sensation:	Intact.
Circulation:	Intact.
Range of Motion:	See enclosed sheet.

X-RAYS: X-rays of the left index finger, taken at the time of todays office visit, reveal the following:

The patient has evidence of a well healed fracture of the proximal phalanx of the left index finger.

DIAGNOSIS: HEALED FRACTURE, PROXIMAL PHALANX OF THE LEFT INDEX FINGER.

COMMENT: The physical findings are compatible with the history as given by Mr. George Fimbres. It is felt that as a result of the patient's work-related injury occurring on 3-6-81 the patient sustained a spiral fracture of the left index finger. He has been treated in an appropriate manner and has gone on to enjoy healing of the fracture.

It is felt that at this time whirlpool treatments three times a week serves the patient no useful purpose. It is felt that the patient could at this time discontinue all physical therapy, return to his pre-injury work activities, and carry these out on a full-time basis without limitations.

It is further felt that, considering the above-noted factors, for rating purposes we can consider Mr. George Fimbres to be permanent and stationary with regards to his work-related injury.

According to the criteria established by the AMA in evaluating permanent impairment, we feel that Mr. Fimbres has sustained a 1% damage to his left index finger as a result of his work-related injury.

Very truly yours,

Peter S. Lorman, M.D.

PSL:mg
Enclosure - 1

NOTE: Medical records being returned under separate cover.

bcc: Coast Committee

May 15, 1981

The Hon. Don Nickles
Chairman, Senate Subcommittee on Labor
Washington, D.C. 20510

Dear Mr. Chairman:

Your Subcommittee will shortly be considering legislation which would fundamentally alter the substance of the Longshoremen's and Harbor Workers' Compensation Act. Among the changes that would be enacted would be a redefinition of longshore work and worksites covered by the Act; termination of the worker's right to choose his own physician within accepted professional limitations; and a number of changes in the Act's basic benefit formula.

As you know, the ILWU has opposed and will continue to oppose such amendments. We feel that the problems that may exist with the Longshore Act are administrative rather than legislative, and that the costs of the program could be substantially reduced through improved occupational safety and health policies and more effective regulation of the private insurance industry.

It is my view, however, that much of the current dispute over the Act has arisen from a widespread misunderstanding of the nature of longshore work and of the hazards that are associated with it. The 15,000 longshoremen on the West Coast, Canada, Alaska, and Hawaii who are members of the ILWU carry out a wide diversity of cargo loading and unloading operations. Our industry, moreover, has been more radically transformed over the last 20 years through automation than any other I am aware of; and this metamorphosis has had far-reaching effects on the physical circumstances of our work.

I am not aware to what extent you have had direct contact with the maritime industry, but it occurs to me that prior to your legislative deliberations you might find it valuable to observe at first hand the work performed by ILWU longshoremen at one of our ports. Accordingly, I would like to extend a personal invitation to you and to the other members of your Subcommittee (and to any staff members you may care to designate) to visit the harbor at San Pedro, California, where ILWU Local 13 has jurisdiction over all longshore work. We will be happy to make all the necessary arrangements with our employers, and to schedule your visit so that you are able to observe as many of the various operations in progress as possible within a short time.

It is my hope that such a visit will better familiarize you with our perspective on the Longshore Act, and help you to see why we view many of its current provisions as essential and justifiable.

Of course, I would prefer that your visit take place prior to the oversight hearings you have scheduled for June 9 and 10. If this is not possible, however, we will try to accommodate you at any time thereafter.

I look forward to hearing from you.

Sincerely,

James R. Herman
President

JRH/r

cc: Sen. Harrison Williams
Sen. Edward Kennedy

ORRIN G. HATCH, UTAH, CHAIRMAN

ROBERT T. STAFFORD, VT.
DAN QUAYLE, IND.
PAULA HAWKINS, FLA.
DON NICKLES, OKLA.
LOWELL P. WEICKER, JR., CONN.
GORDON J. HUMPHREY, N.H.
JEREMIAH DENTON, ALA.
JOHN P. EAST, N.C.

EDWARD M. KENNEDY, MASS.
JENNINGS RANDOLPH, W. VA.
HARRISON A. WILLIAMS, JR., N.J.
CLAIBORNE PELL, R.I.
THOMAS F. EAGLETON, MO.
DONALD W. RIEGLE, JR., MICH.
HOWARD M. METZENBAUM, OHIO

ROBERT P. HUNTER, CHIEF COUNSEL AND STAFF DIRECTOR
RITA ANN PFEIFFER, CHIEF CLERK
LAWRENCE C. HOROWITZ, M.D., MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON LABOR AND
HUMAN RESOURCES
WASHINGTON, D.C. 20510

May 22, 1981

Mr. James R. Herman
President
International Longshoremen's and
Warehousemen's Union
1188 Franklin Street
San Francisco, California 94109

Dear Mr. Herman:

Thank you for your recent letter and kind invitation to me and/or staff to visit the harbor at San Pedro, California to view the operations of the ILWU Local 13.

At the present time Senate business prevents me from leaving Washington, however, I will keep the visit in mind after the Longshore hearings which are scheduled for June 16th and 17th.

Again, I appreciate your invitation.

Sincerely,

Don Nickles
Chairman
Subcommittee on Labor

DN/ca

bcc: Mike Lewis, ILWU, Wash., D.C.

Excerpt from the Pacific Maritime Association's Annual Report/for 1980

SHORESIDE OCCUPATIONAL INJURY AND ILLNESS INCIDENCE RATE

Incidence Rate: The number of lost workday injuries and illnesses per 100 full-time workers, based on Occupational Safety and Health Act recordkeeping methods.

	1980	1979	1978	1977	1976	1975	1974
Southern California	**14.5**	14.0	13.2	14.4	13.4	13.2	11.8
Northern California	**15.6**	14.6	12.2	12.7	15.4	14.2	14.1
Oregon	**19.8**	18.5	15.8	15.5	13.8	13.9	13.8
Washington	**15.6**	14.7	13.9	15.1	13.4	14.6	11.4
Coast	**15.7**	14.8	13.4	14.2	14.0	13.8	12.7

The national average incidence rate for all private sector employment in the U.S. in 1979 was 9.2 occupational injuries and illnesses for each 100 full-time workers (most recent figure published).

Excerpt from the Pacific Maritime Association's Annual Report for 1980

LONGSHORE PRODUCTIVITY AND LABOR COST

	WEIGHTED TONNAGE[1]	LONGSHORE HOURS[2]	LONGSHORE LABOR COST	COST PER HOUR	TONS PER HOUR	COST PER TON	HOURS PER TON
—1960	19,877,926	23,757,382 ✓	$ 96,206,615	$ 4.13	.837 ✓	$4.94 ✓	1.195
1961	18,776,312	22,293,093	98,615,616	4.42	.842	5.25	1.187
1962	19,761,461	21,210,919	98,580,206	4.65	.932	4.99	1.073
1963	21,707,956	22,512,410	109,966,947	4.89	.964	5.07	1.037
1964	23,418,125	22,498,509	114,268,757	5.08	1.041	4.88	.961
1965	26,701,377	24,387,133	129,577,905	5.31	1.095	4.85	.913
1966	31,233,729	26,653,343	156,934,437	5.89	1.172	5.02	.853
1967	33,588,221	25,482,708	162,835,294	6.39	1.318	4.85	.759
1968	37,789,710	25,235,089	161,673,283	6.41	1.498	4.28	.668
1969	39,731,275	24,310,961	157,891,812	6.49	1.634	3.97	.612
1970	39,497,613	19,693,920	136,664,699	6.94	2.006	3.46	.499
1971	32,667,466	14,838,081	104,338,355	7.03	2.202	3.19	.454
1972	40,884,595	15,824,173	140,778,785	8.89	2.584	3.44	.387
1973	46,112,090	15,734,545	153,542,038	9.76	2.931	3.33	.341
1974	49,680,710	14,808,231	158,573,346	10.71	3.355	3.19	.298
1975	43,251,982	12,130,379	148,917,246	12.28	3.566	3.44	.280
1976	52,107,342	12,349,221	180,323,480	14.60	4.219	3.46	.237
1977	56,706,417	12,024,044	186,775,763	15.53	4.716	3.29	.212
1978	63,475,628	12,909,558	218,380,625	16.92	4.917	3.44	.203
1979	67,956,753	13,540,093	258,934,024	19.12	5.019	3.81	.199
—**1980**	**73,538,059**	**13,376,301** ✓	**262,416,976**	**19.77**	**5.498** ✓	**3.60** ✓	**.182**

[1] Weighted tonnage is total general cargo tonnage added to 1/5 of dry bulk cargo tonnage.

[2] Travel time hours **not** included.

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Parts 1910 and 1918a

[Docket No. S-506]

Marine Terminals; Proposed Rulemaking

AGENCY: Occupational Safety and Health Administration Department of Labor.

ACTION: Proposed standard.

SUMMARY: The Occupational Safety and Health Administration (OSHA) is proposing to add a new part, 29 CFR Part 1918a, safety and health regulations for marine terminals.

The proposed standards covers cargo handling and related activites at marine terminals and addresses the safety and health hazards associated with the shoreside portion of the marine cargo-handling industry. Marine cargo-handling operations that take place aboard vessels will continue to be regulated under 29 CFR Part 1918, the safety and health regulations for longshoring.

This proposed rule is a vertical standard, i.e., one which applies to this industry exclusively and is designed specifically to address the hazards associated with marine cargo-handling ashore. However, certain sections and subparts of Part 1910, the general industry standards, would continue to apply to marine terminals and have been incorporated by reference in the vertical standard. The new Part 1918a would apply exclusively to marine terminals, except for those provisions of Part 1910 referenced in the new Part.

This proposal contains requirements for marine terminal operations, cargo handling gear and equipment, personal protective equipment, operations such as welding and spray painting, and specialized terminals such as container terminals and menhaden facilities. The water transportation services industry, which is largely comprised of the marine cargo-handling industry, has an occupational injury incidence more than twice the average rate of industries in the private sector, and a severity rate seven times as great. The principal hazards addressed by this proposal are injuries and accidents associated with hoisting gear, hazardous atmospheres, materials handling, powered industrial vehicles, ship's gear, vehicle and pedestrian traffic, and other marine cargo-handling operations.

DATES: Written comments and any requests for a hearing must be postmarked on or before May 15, 1981.

ADDRESS: Written comments and requests for a hearing should be submitted to the Docket Officer, Docket No. S-506, Occupational Safety and Health Administration, Room S 6212, U.S. Department of Labor, Washington, D.C. 20210, (202) 523-7894.

FOR FURTHER INFORMATION CONTACT: Mr. Basil Needham, acting director, Office of Maritime Safety Standards, Occupational safety and Health administration, U.S. Department of Labor, 200 Constitution Avenue, NW., room N3471, Washington. D.C. 20210, Telephone: (202) 523-7234.

SUPPLEMENTARY INFORMATION:

I. History.

Due to the alarming number and serious nature of the accidents and injuries in the marine cargo-handling industry, Congress amended the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) (44 Stat. 1424; 33 U.S.C. 901 et seq.) in 1958 to provide maritime employees with a safe work environment. The amendments (P.L. 85-742, 72 Stat. 835) significantly strengthened Section 41 of the LHWCA (44 Stat. 1444; 33 U.S.C. 941) by requiring employers covered by the Act to "furnish, maintain and use" equipment and to establish safe working conditions in accordance with regulations promulgated by the secretary of Labor. Two years later, the Labor Standards Bureau (LSB) of the Department of Labor (DOL) issued the first set of safety and health regulations for longshoring activites as 29 CFR Part 9 (25 FR 1565). These standards were amended on several occasions between 1960 and 1971. Since 1971, there have been no substantive changes in these provisions. However, these regulations only covered longshorign activities taking place aboard vessels.

Passage of the Occupational Safety and Health Act (the Act) (84 Stat. 1590; 29 U.S.C. 650 et seq.) by Congress in 1970 enabled the Federal government to become directly involved with commercial shoreside cargo-handling operations in marine terminals. Section 6(a) of the act (84 Stat. 1593; 29 U.S.C. 655) authorized the Secretary of Labor to adopt established Federal standards issued under other statutes, including LHWCA, as occupational safety and health standards under the Act. Accordingly, the Secretary adopted the existing longshoring regulations as OSHA regulations and recodified these rules as 29 CFR Part 1918 (39 FR 22074, June 19, 1974). Since the Act comprehensively covered all private employments, the longshoring standards also applied to shoreside cargo handling operations. (See 29 CFR 1910.16.)

In addition, in accordance with established policy codified at 29 CFR 1910.5(c)(2), OSHA has applied its general industry regulations to shoreside activities not covered by its older longshoring rules. Citations have also been frequently issued under Section 5(a)(1) (the General Duty Clause) of the Act (84 Stat. 1593, 29 U.S.C. 654) (Ex. 22), since some serious hazards are not addressed either by requirements in Part 1910 or Part 1918.

The attempt to apply and to enforce provisions from different standards to shoreside activities has encouraged a fragmentary approach to compliance activity, has produced much misunderstanding and dissension, and has not provided adequate employee protection. As a result, several groups have requested that OSHA "make the industry whole" by consolidating all the regulations applicable to the marine terminal portion of the cargo-handling industry into a comprehensive set of regulations parallel to those for the shipboard portion of the operation. OSHA believes that a marine terminal standard tailored specifically to the hazards and circumstances of this industry, written in simplified and more understandable language, is clearly needed.

II. Background of the Proposal.

In the early 1960's, OSHA's predecessor agency, the Bureau of Labor Standards, played an important role in developing an American National Standards Institute (ANSI) marine terminal standard (ANSI MH9) to assist the industry in its voluntary efforts at accident prevention. When completed, however, this consensus standard left many gaps in safety coverage, and it was somewhat out of date by 1971. A new ANSI MH9 committee was established after the advent of OSHA, and in 1972 this group developed a revised ANSI marine terminal standard, Safety Requirements for Marine Terminal Operations, ANSI MH9.1. OSHA had intended to adopt this new ANSI revision under Section 6(a) of the Act; however, the Agency did not do so because the standard was considered incomplete and because the legal authority to adopt such national consensus standards expired in April 1973. OSHA then began to develop its own marine terminal standard, using ANSI MH9.1, State standards, other available data, and staff experience and research as starting points.

Subsequently, the Assistant Secretary of Labor for OSHA appointed an ad hoc Standards Advisory Committee (SAC) to review the Agency's draft marine terminal document and to make appropriate recommendations. (A list of committee members and their affiliations appears in the front of the volume of committee recommendations, which has been entered in the record (Ex. 2)). The first meetings of the SAC took place in June 1974, and its period of service terminated in March 1975. Staff work then resumed, with review and consideration of the transcripts of committee meetings and recommendations, and further revision in response to the committee's comments.

All available material and data have since been given careful review, in particular the issues raised by the SAC and accident and injury data related to marine terminal operations. OSHA has also continued to monitor industry trends, such as the increasing use of intermodal containers, and coverage for hazards associated with these relatively recent industry developments has been incorporated into the proposal.

Any specific final recommendations made by the SAC on provisions of the draft marine terminal proposal are discussed in the Summary and Explanation section of this preamble, in connection with the relevant provisions of the proposal; references to Advisory Committee discussions that were inconclusive and did not result in a specific recommendation have not been included in this preamble. However, transcripts of the Committee's deliberations and a copy of their recommendations are in the rulemaking record (Ex. 2–12).

This proposed standard was written to enhance the safety of dock workers, to address the specific hazards associated with the marine terminal industry, and to encourage voluntary compliance by employers and employees. To achieve these goals, the proposal has been written in straightforward, performance-based language, which has allowed OSHA to reduce the volume of these proposed regulations to ⅓ that of the existing rules that currently apply to marine terminals. In addition, in an effort to keep the employer's compliance costs to the lowest level consonant with employee safety, the proposed standard makes extensive use of the "grandfather clause" or phase-in concept. This practice will reduce to a minimum the amount of equipment that must either be replaced or retrofitted to comply with the standard's provisions. Another method of reducing costs and avoiding regulatory rigidity is the proposal's use of a range rather than a specific figure, for design or construction specifications. For example, rather than specifying the guardrails must be 36 inches high, the proposal permits railing height to fall within a range which experience and ergonomic research have determined to be appropriate and safe. Finally, OSHA has worked closely with the U.S. Coast Guard throughout the development of this proposal, to ensure that the proposed requirements complement and do not conflict with that agency's regulatory efforts in the marine terminal environment. Section 4(b)(1) of the Act (84 Stat. 1592, 29 U.S.C. 653) preempts OSHA jurisdiction in areas in "which other Federal agencies . . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." Thus, in marine terminals, OSHA's jurisdiction does not apply to those working conditions as to which the Coast Guard has exercised its statutory authority to promulgate standards affecting occupational safety and health.

The shortened forms listed below are used throughout this preamble to refer to the following sources: Standards Advisory Committee—SAC; American National Standards Institute, Safety Requirements for Marine Terminals—ANSI MH9.1; OSHA's safety and health regulations for longshoring—Part 1918; OSHA's general industry standards—Part 1910; and exhibits in the rulemaking record—Ex.

III. Marine Terminal Hazards

The work environment at a marine terminal exposes maritime employees to a greater risk of injury than is true for workers in most other industries. In terms of number of injuries per worker and of lost workdays per worker, cargo-handling operations in American ports represent some of the most dangerous activities in American industry. A simple comparison of injury incidence and accident severity rate between the marine terminal industry and the industrial average for the private sector will illustrate the hazardous nature of the work performed along the waterways of this country.

Examination of accident data compiled by the U.S. Bureau of Labor Statistics (BLS) up to 1978 reveals that the injury incidence for marine cargo-handling operations is more than twice that of the national average. More specifically, BLS found an average injury incidence for the private industrial sector of 9.2 injuries per 100 full-time workers, while the rate for water transportation services (SIC 446, made up in large part by the marine cargo-handling industry) was 21.6 per 100 employees (Ex. 18).

Even more disturbing are the comparative BLS figures on accident severity. The severity rate, computed on the basis of lost workdays per worker, was seven times greater for maritime employees than the national average. Though only 62.1 workdays were lost on the average to occupational injury (per 100 full-time workers), those industries supplying water transportation services suffered losses of 454 lost workdays per 100 workers (Ex. 18). Even when compared to the accident severity rate of a high hazard industry such as construction, the accident figures for cargo handling operations are still significant and unsettling. The lost workday incidence rate for construction was only 108.1 days per 100 workers, leaving the maritime industry with an accident severity rate four times greater than that of construction (Ex. 18).

The particular hazards encountered at marine terminals are as varied as the cargoes that move through terminal gates. Technological advances in waterborne trade such as the development of container ships, roll on-roll off (Ro-Ro) vessels and "lighter aboard ship" (LASH) barges have eliminated many hazards, but created new ones. In an effort to pinpoint the major types of maritime accidents, OSHA contacted Cooper and Company of Stanford, Connecticut to study this problem. The company surveyed approximately 7,000 injury reports (Employer's First Notice of Injury or Illness) for 1974, and issued a report in 1975 which listed, by percentage, the 20 leading types of accidents associated with longshoring activities (Ex. 32):

[illegible]	Percentage
Slip/Trip on Dock Deck	13.7
Strain/Sprain, Lifting/Carrying	9.4
Caught Between Load/Object	8.1
Hit by Lashing Gear	5.8
Hit by Load/Draft	5.4
Foreign Body in Eye	4.7
Hit by Falling Cargo	4.6
Hurt Handling Drums	4.4
Cut on Cargo	4.1
Hit by Dunnage	4.0
Foot Through Dunnage/Cargo	3.3
Hit by Industrial Truck	3.3
Sensitivity to Cargo/Fumes	3.1
Slipped on Ladder	2.9
Step on Nails	2.8
Cut on Hook	2.6
Hit by Falling Object	2.5
Hit by Sling/Bridle	2.2
Hit by Rolling Pipe/Steel	2.2
Hurt Avoiding Accident	1.7

Additionally, the Agency sought to determine the types of accidents that generated the greatest cost, in terms of dollars expended for medical and compensation purposes. To make this determination, OSHA relied on a study performed by the Liberty Mutual Insurance Company. This study, published in the February 1978 edition of American Seaport Magazine, reported that Liberty Mutual reviewed 297 "high cost" accidents occurring in the marine cargo-handling industry. The insurance company found that more than 69 percent of the total costs and 66 percent of the total number of cases surveyed fell within two broad classes of accidents, "falls" and "struck by falling objects." To more firmly underline this point, Liberty Mutual (Ex. 60) reproduced this accident data in the following tabular form:

Stevedoring Operations—A Review of 297 High Cost Accidents

[Figures in parentheses equal percentage]

	Number of accidents	Cost of accidents
Falls	115 (39)	$1,985,800 (37.6)
Struck by falling objects	80 (27)	1,665,200 (31.6)
All others	102 (34)	1,628,400 (30.8)
Total number	297	
Total cost		5,280,400

From the above: 66 percent of the total number and 69.2 percent of the total cost were from "Falls" and "Struck by falling objects."

Falls

Types of falls	No. of cases	Total cost[1]	Average cost[1]
Fell to working surface	40	$405,000	$10,800
Fell between cargo	22	436,500	19,840
Fell from ship's ladders/portable ladders	16	438,400	27,400
Fell to lower level	16	241,900	14,700
Fell from piled cargo, piled dunnage, piled hatch boards, etc.	14	342,080	24,400
Fell from forklift trucks and other similar equipment	7	121,800	17,300

[1] Medical and compensation costs.

Struck by Falling Objects

Type of object	No. of cases	Total cost[1]	Average cost[1]
Cargo (from drafts, stacked cargo, or while manually handling)	55	$1,282,302	$23,314
Hatch gear	10		
Empty pallets	4		
Parts from gear failure	3	382,898	15,316
Dunnage	3		
Other	5		

[1] Medical and compensation costs.

Agency review of some of its recent accident data confirmed Liberty Mutual's finding regarding the existence of "falls" and "struck by objects" as major accident categories in the maritime environment. Accident figures for longshoring activities in the Port of New York (Ex. 29) during the first six months of 1980 revealed that out of a total of 1,256 reported accidents, 280 were attributed to "slips, trips and falls," and 119 consisted of instances where employees were struck by falling cargo. Moreover, another 247 accidents occurred as a result of employees being struck by or against drafts, or by other objects being handled. Another major source of injury was operation of mobile equipment (168 accidents). Additionally foot injuries (122) represented almost 10 percent of the total number of injuries for this six-month period (Ex. 29). An OSHA survey of the West Coast accident experience for marine cargo handling operations during this same period found that out of a total of 2,643 reported accidents, falls accounted for 684 injuries and "struck by or against" accidents numbered 711. Injuries associated with the operation of mobile equipment totaled 204, while foot injuries (348) formed 13.2 percent of the total West Coast accident figure (Ex. 30).

Another way the Agency chose to focus on the major sources of maritime accidents for rulemaking purposes was to examine the fatal maritime accidents reported to OSHA during the period July 1972–April 1980. A brief summary of ten of the more than 180 fatal accidents reviewed is provided below, along with a reference to the relevant provision in the proposal (Ex. 80–90).

New York, New York—December 1973

An employee inspecting a container gantry crane was thrown from his position atop a trolleying drum house, when the entire trolley apparatus traveled past the out reach stops of the crane. The employee struck the container spreader in his fall, and though quickly pulled from the water, never regained consciousness (See § 1918a.45(g)(6)).

Everett, Massachusetts—August 1974

A worker engaged in a welding operation adjacent to a set of large rollers was drawn into an eight inch space between the rollers and was crushed. No provision had been made to lock out the electric power that activiated this equipment. The power was accidentally turned on, resulting in this employee's death (See § 1918a.151(b)(7)).

Tampa, Florida—May 1975

An employee suffocated in tons of citrus pellets, when he attempted to clear the flow of a jam within a silo without benefit of a safety harness and lifeline. The jam suddenly cleared and the worker was swept under twenty feet of the bulk cargo. On the spot rescuers were helpless and watched him disappear under the cargo (See § 1918a.49(i)(3)).

Miami, Florida—September, 1975

A terminal worker accidentally fell into an opening atop a hopper car filled with corn grain. the opening was unguarded, facilitating easy entry, and the employee died, asphyxiated by the cargo (See § 1918a.49(c)).

Port Newark, New Jersey—March, 1976

The driver of a large fork lift (stacker) struck a yard tractor at a cross aisle where visibility was obstructed by container stows. The driver of the yard tractor was operating on the wrong side of a two-lane thoroughfare (See § 1918a.44(d)) and neither driver was required to sound a warning or stop at the cross aisle, despite poor visibility (See § 1918a.43(b)(6) and § 1918a.44(e)). The driver of the yard tractor was thrown from his vehicle and killed.

Baltimore, Maryland—March, 1976

Two employees were killed and another seriously injured when two large rail mounted container gantry cranes were pushed down their tracks by strong winds. Wind warnings were issued prior to the accident. There were intermittent gusts of 40 and 50 mph throughout the four hour period prior to the accident. Audible wind warning alarms had been made inoperable. No policy existed at the port for discontinuing operations at a specific wind velocity. The cranes were swept off the end of the apron and into the adjacent waters (See § 1918a.45(g)).

San Juan, Puerto Rico—October, 1976

A checker was crushed to death when a yard tractor driver accidentally hit the tractor's accelerator pedal. The checker was noting marks at the rear of a mounted container that was in a truck line. The yard tractor that struck him was waiting immediately behind the container (See § 1918a.71(i)).

San Juan, Puerto Rico—March, 1977

While containers were being unloaded from a vessel by a crane the crane's cargo fall broke and a loaded container fell striking three longshoremen below. The crane had exceeded its operable rating and the container was overloaded (See § 1918a.45(b)(2) and § 1918a.71(f)).

St. Louis, Missouri—February, 1980

A terminal worker was killed when he fell 8 feet from an unguarded platform above a hopper. The employee was controlling the flow of fertilizer through the hopper when he lost his balance and fell over the open edge (See § 1918a.49(b)).

Port Elizabeth, New Jersey—June, 1980

Three rail mounted container gantry cranes were swept down their tracks by high winds. weather alerts and high wind warnings were issued as early as four hours before the incident. Upon investigation, the Agency learned that much of the equipment needed to secure the cranes had fallen into disrepair and was not serviceable (See § 1918a.45(g)).

As noted above, these accidents form only a fraction of the accident data surveyed and represent only a small protion of the hazards that this proposal addresses. However, it is possible that OSHA may not have surveyed all the relevent classes of accidents that occur at marine terminals, and therefore may not have provided protection in the proposal from all major hazards present at a terminal. OSHA is therefore solicitous of any accident information relevant to the hazards found at a terminal especially if it relates to one of the provisions in the proposed standard.

The available data on accidents and injuries in marine terminals indicate that terminal employees are exposed to a significant risk of injury in the workplace. OSHA therefore believes that a marine terminal standard is reasonably necessary for the protection of these employees from a wide range of workplace hazards.

(A) Vertical vs. Horizontal Standards

This proposed marine terminal standard is drafted in a format that will allow it to stand by itself, i.e., to be a "vertical" standard (one that applies to this industry exclusively and in lieu of any other OSHA standard); in a few areas of coverage specified in the proposal's scope section, OSHA's general industry standards are incorporated by reference. In general, vertical standards encourage voluntary compliance because they are directed to the particular problems of the industry, and because they only contain provisions that are appropriate to the industry in question. On the other hand, since many industries covered by OSHA do in fact use the same or similar equipment and processes, and therefore have employees who are exposed to the same hazards, it is usually a more efficient use of the Agency's resources to develop "horizontal" standards (those applying to more than one industry). It is also more efficient to train field personnel in general safety programs tailored to the horizontal general industry standards than to train field staff in individual programs designed for specific industries.

The Standards Advisory Committee discussed the merits of vertical versus horizontal standards at some length. The committee recommended that some provisions of OSHA's general industry standards continue to apply in marine terminals, but the group also recommended that a vertical standard be written to apply to those aspects "that are unique to Marine Terminal Facilities" (Ex. 2:1a). However, OSHA has subsequently received several letters (Ex. 58), many from former members of the SAC, urging the Agency to adopt a predominantly vertical marine terminal standard and testifying to the difficulty and confusion associated with trying to comply with two sets of standards (Parts 1910 and 1918).

In many respects, marine cargo handling is a single operation, despite the fact that it has both ashore and afloat segments. Both segments of the marine cargo-handling industry employ longshoremen, both use many of the same types of equipment, and both require many of the same operational procedures. The line between cargo handling aboard a vessel and such work ashore has traditionally and for regulatory purposes been drawn "at the foot of the gangway." In practice, however, loading or discharging cargo from a vessel is one continuous operation which cannot logically be divided into two distinct functions. For example, regardless of whether fork lifts are used in the hold of a ship or inside a terminal, whether ship's gear or house fall gear is used to hoist cargo, or whether vessel cranes or shore cranes perform the lift, the tasks to be done, the hazards to be addressed, the workers involved, and the type of equipment to be used are essentially the same. The fact that cargo handlers involved in both shipside and shoreside aspects of the operation use the same distinctive terms, such as dunnage, burtoning gear, recoopering, stowage, and apron, attests to the common tradition and the unitary nature of the marine cargo-handling industry.

Despite this commonality, however, there are substantial differences between the work environments of longshoremen on board ship and those working ashore. For example, shipboard conditions vary greatly among particular ships, and the restricted spaces and close clearances typical of work aboard ship exacerbate many of the hazards commonly associated with cargo-handling. The equipment and machinery used to handle cargo aboard ship also differ somewhat from those used ashore. For example, vessel cranes and hoisting gear usually have lower rated capacities than their shore-based counterparts. In addition, there are significantly fewer powered industrial trucks aboard ships than in terminals. Further, certain equipment frequently used in cargo-handling at marine terminals, such as railcars, conveyors, chutes, and hoppers, is not found aboard vessels. These differences in shipboard and shoreside work environments are substantial enough to warrant careful consideration of the hazards unique to each aspect of the industry and have led OSHA to propose this marine terminal standard as a document distinct from, but complementary to, the Agency's longshoring standard. Ultimately, appropriate changes in part 1918 will be proposed to make it consistent with the marine terminal standard.

The entire marine cargo-handling environment, both shipside and shoreside, is also unique in several respects, especially in comparison to other industries. For example, longshoremen must continually work in the harsh environment of the waterfront, which requires exposure both to work-related hazards, such as falling cargo, and to environmental hazards, such as drowning and working around machinery in high winds. Additionally, dock workers perform some of the same high-hazard tasks, and confront many of the same heavy-industry hazards, as those typically associated with the construction industry. Examples of such hazards include falls, crushing and caught-in injuries, and traffic accidents, which are common in container terminals. Cargo handling and construction work are also both seasonal and weather-dependent, and both industries have a high proportion of part-time and transient employees. Longshoremen are also likely to be exposed more frequently and often for longer periods to certain hazardous work situations, such as work in restricted spaces and hazardous atmospheres, than would be the case for many workers in general industry. The excessive occupational injury and illness incidence for the marine cargo-handling industry, more than twice the national private sector average, testifies to the hazardous nature of longshoring (Ex.18: 62, 69). The Hazard section of the preamble above, describes in greater detail the accidents and injuries to which longshoremen are subject.

After careful consideration of the advantages and disadvantages of vertical and horizontal standards, Senator NICKLES. Thank you, Mr. Lewis.

Mr. LEWIS. I should mention, Mr. Chairman, that Mr. Krieger comes from that particular local, and if you have additional questions, we would be glad to respond to them.

Senator NICKLES. Thank you.

I would hope—and Mr. Smith, you alluded to it, and Mr. Lewis, vaguely—that we could sit down and that we can work together to make some changes, which I think we would all agree, that we are going to have to make some changes. And I hope that when anybody would look up and see that we have compensation rates that cost 87 percent of payroll or 67 percent of payroll, that we have some serious problems, and address those problems legislatively, administratively, collectively, whatever way we can do to work together to try to restore balance, because there is no question that we are losing business and that we are losing jobs. Those are substantiated—and I would agree maybe not all of it is because of this Longshoremen's Act, but certainly, we can take some steps, if we work together. I think if we do not work together, I do not think it would be in the best interest of yourselves or for this legislation. To come up with the best piece of legislation for your members, for the people who are injured, that is my—and I am not really wanting to work for the longshore union or for the shipbuilding industry or for anybody else. I want to come up with a decent piece of legislation for the injured worker that will also protect the American consumer and taxpayer, and I think that is an achievable goal. But I think to achieve that and make it equitable on all sides, I think we have to work together and not really be adversaries in this relationship.

A couple of questions. You alluded to the fact, Mr. Lewis, of the number of claims. We have seen that the number of claims dropped from approximately 122,000 in 1970 to around 100,000 in 1972. There has been an astronomical rise in a period of 8 years, to go from these 100,000 claims in 1972, and now we are up to 257,000 claims. That is 2½ times more claims. Is it more dangerous to work on the docks now than it was 8 years ago?

Mr. LEWIS. Yes. As a matter of fact, I am glad you mentioned that. I think we both will probably want to answer that question. It was said earlier that it is in fact safer to work in the longshore industry now than it was years ago, and in fact, the opposite is true, Mr. Chairman.

This is true because, in fact, the new technology that has come into the longshore industry has greatly extended the diversity of hazards that longshoremen have to work under today. A longshoreman sent out from a hiring hall may have to work a traditional breakbulk ship, in the more traditional way of loading or unloading cargo, or he may be sent to the most sophisticated container facility. He has to have a very wide-ranging sense and knowledge of what the safety conditions are in each of those different work environments in order to keep himself whole. In addition, I should emphasize that this new technology that was referred to earlier has, far from eliminating hazards, created a whole new generation of work hazards that did not exist before. For example, containers were mentioned earlier. Many workers have to work on top of containers which are stacked on top of each other, either on the ship or in the container yard, and the workers may be up to 40 feet above the ground. We have had many instances of workers falling and either killing themselves or suffering serious injury, and this takes place largely because the surfaces of these containers are very slippery, very smooth, easy to slip on, edges are unguarded, openings in the containers are also unguarded.

So we have taken steps to try to convince management to introduce such features as safety lines, safety belts, and cages—the kind of features which are, in fact, very commonly in use in Japan right now. It is not a revolutionary change. But we meet resistance; we do not meet cooperation.

Senator NICKLES. Let me ask you a followup question on the same line. Have the number of work-related deaths increased since 1972?

Mr. LEWIS. The absolute number, I cannot say.

Mr. LEONARD. There is no record of that.

Senator NICKLES. We will research that. That is fine. Let me ask you a couple of other questions.

Mr. KRIEGER. Mr. Chairman, just in response to that, the number of deaths have increased in the last couple of years, of active, working longshoremen. They have nearly doubled from 1979 to 1980.

Senator NICKLES. How does that figure?

Mr. KRIEGER. Last year's deaths on the west coast for active men were 67 deaths. That came out of their recent caucus figure; 67 deaths.

Senator WILLIAMS. That is the west coast, did you say?

Mr. KRIEGER. On the west coast.

Senator NICKLES. That were work related?

Mr. KRIEGER. Active working men.

Senator NICKLES. Well, work related?

Mr. KRIEGER. I do not know. They were not broken down. They were there for physical reasons for deaths. They were not talking about this legislation. That is why it was not provided that way.

Mr. LEWIS. I could give you an example, Mr. Chairman, of a death that took place last summer, as a matter of fact, in our Port of Sacramento, where a worker was killed by a frayed mooring line that suddenly snapped and struck him on the head. This was a mooring line that should never have been in use at the time. And one of the basic problems that we have always had in health and safety is replacing worn gear that has outlived its usefulness and outlived its safety requirement.

Senator NICKLES. Mr. Sullivan, you have worked in the Buffalo area. Have you noticed a decline in the amount of freight? We have mentioned statistics that came from the Department of Labor on one of our charts that showed billions of dollars worth of cargo that is going to Canada. Does this fact concern you?

Mr. SULLIVAN. Yes, it does, Senator. And on the matter of the Canadian diversion, I have a particular interest in this condition because the hearing tomorrow is a culmination of an action that was taken that I was directly involved in in 1976. The Maritime Administration, in conjunction with the Corps of Engineers, the U.S. Coast Guard, and the Saint Lawrence Seaway Development Corporation, called a 3-day conference to assess priorities and problems in the Great Lakes region. And one of the resolutions that was considered by the conference was a resolution that I prepared on Canadian diversion. At that time there was not any statistical information available. We knew that the boxes were going across the Detroit River, and they were moving by Canadian rail, principally, over the Sioux, into the eastern Canadian provinces. And as a result of this conference, it was recommended that the Maritime Administration conduct the study. And the first study was done as a result of that resolution. And it was our thought, at least the conclusion that has been reached by Congressman Biaggi and his cosponsors, is that the principal cause, the principal factor causing this diversion, is the loophole in the 1916 Shipping Act relating to the filing of tariffs with the Federal Maritime Commission.

Senator NICKLES. Do you think the fact that longshoremen rates are anywhere from 3 to 30 times as high in the States has any real impact on the decision of shippers to go through Canada and to ship by rail or other means than through the States?

Mr. SULLIVAN. Senator, I could not really answer that question. However, in an effort to cooperate with you, as part of my responsibility, the Province of Ontario is in a district that I am an officer of. We represent longshoremen in the Canadian ports in that district.

For the committee, I will attempt to obtain before next Tuesday what the Canadian compensation for the Longshoremen Act and system is.

Senator NICKLES. I would very much appreciate that because here again, when we are talking about rates that are that much different, we are talking about, as you can well imagine, bundles and bundles of dollars that are ultimately, of course, paid by the consumer.

Mr. SULLIVAN. Senator, I am sure that the cost of doing business, it all affects the way business is done. That is why I indicated before that the International Longshoremen's Association is interested in productivity, in reducing costs, and stimulating our economy, consistent with it, the protection of the workers that we represent and the payment of adequate benefits.

Senator NICKLES. Senator Williams, I took more than my 5 minutes.

Senator WILLIAMS. Thank you, Mr. Chairman.

In Canada, the mechanism for workers' compensation is really governmental, isn't it, either national or provincial?

Mr. SULLIVAN. Yes.

Senator WILLIAMS. In our country, I guess it would be analogous to what we call a State that has a State fund for coverage.

Mr. LEWIS. Yes, exactly, Senator.

Senator WILLIAMS. Now, there is a great difference of how they arrive at compensation in Canada.

Mr. LEWIS. Yes, sir.

Senator WILLIAMS. We basically are private, with some differences—California, I gather, is somewhat different——

Mr. LEWIS. California has a State fund, but there are only six States that now have exclusive State funds that do not allow private carriers in.

Senator **Williams**. So the accounting is considerably different, I would imagine, and accountability for the compensation payments.

Mr. **Lewis**. Absolutely, yes, Senator.

Mr. **Leonard**. I would like to bring up another question. Your people are all familiar with the grain elevators. We have men walking along the waterfront in the United States and Canada. And we protested this, Senator Williams and everybody, and we told the Assistant Secretary of Labor when the Good Pasture elevator went up and exploded and we lost 10 people in Texas, that that was going to happen. We told her a month before all these explosions. And this year, in this country, on the waterfront and inland, we lost two men not too long ago in Corpus Christi—they claim our members are union. These elevators are exploding left and right all over the country. Millions of dollars, and I do not see anybody doing anything about it.

We went down to get a safety law known as the Longshoremen's and Harbor Workers' Compensation Act, section 41. You now want to take section 41 away from us. We have asked for a jurisdictional question, under article III, section 2 of the Constitution of the United States; do we belong under OSHA, or do we belong under the Longshoremen's and Harbor Workers' Compensation Act, which we had before OSHA came along.

Now, we tried to get a maritime safety code for 20 years. We testified in April, and the steamship people, every time we came up with a decent code worked out by labor and management, they knocked it down—the same people sitting in this room—and they go on to say under the present law, under $100 million, economic impact, $38 million would be the first year. We would have no trouble with putting up the code settled. We did it in 1974 and 1975. They come up now, and they attack the law, and there it is in the paper. We are trying to get a safety law to work with labor and management. They attack the law, and then ask for an 80-day extension. This is 20 years. I made four trips around the United States, three paid for by my own union and one paid for by the Department of Labor, and we brought back the evidence, both sides, four and four. We got nowhere.

One more statement. I just heard Mr. Lindsay talk. I was at that meeting, and I am the man who made the agreement. There were four lawyers who attended that meeting, representing management. The National Maritime Compensation Committee—Dennis Lindsay, Portland, Oreg.; Frank Scanlan, Philadelphia; Ed Dickey, Houston, Tex.; Jim Flynn, New York—said, "What do you want to get a deal and give up the third party?" I asked three questions: Protect every man on the dock, free choice of doctor, and third, protect our disability fund and welfare fund, and labor management pays in, because we were paying for the compensation.

When the lawyers made an agreement, the man was appearing on our welfare the next day, and I was in charge of that, and I played the game as honest as I could. And that is all we asked. It is in the letter; we asked for that. They said, "You got a deal."

Now, there were 16 people in there. I was the only poor guy, because I was not a lawyer. The rest were all lawyers. Fair and equal people—four solicitors, the subcommittee from the Republicans and the subcommittee from the Democrats. The meeting ran 6 hours. It was fair and honest. There was nothing sneaky about it. It was aboveboard. They agreed to it. They went to President Gleason and said, "Would you send him down to Washington?" And they worked with us for a couple of years to do away with the third party, and we went along to help the industry. And my instruction with President Gleason was to work with them, stay with them, and they stood with us night and day. Senator Williams said that very clearly before.

What did we get? And now, we are being attacked again by the same people who we thought we helped, and we thought we set down a gentlemen's agreement.

Senator NICKLES. OK. We are going to have to move on. We have nine more witnesses.

Senator WILLIAMS. Could I just see if we can clarify governmental, jurisdictional, or safety and healthful conditions in the waterfront area. How close to the waterfront does OSHA's jurisdiction go?

Mr. LEONARD. In four States in the Midwest, it is the State——

Senator WILLIAMS. No, no. I mean the national safety and health law, how much of the waterfront does it cover?

Mr. LEONARD. Right to the ship. On the 1910, it is on the dock; 1918 is OSHA law.

We had a case in Pat's local where a man was killed, and they gave them a $4,000 fine. They go on the ship. We have two laws: 1918 is on the ship; 1910 is on the dock. As we have said to the committee many times, you are making our man a half a man.

Today, under the new operation, roll-on and roll-off ships, our men drive containers on the ships, they come out on the dock. What are you going to tell a guy—"I will pay you compo in the morning for Federal, and in the afternoon, I will get you State compo"?

Now, we have got many roll-on and roll-off ships, where our men have to go aboard the ship. And we agreed with the management people who were negotiating with us that in the compound is where we pay the man, and we lived up to our agreement.

Mr. LUCH. Senator, to answer Senator Williams' question, OSHA is allowed aboard the ship. They go to the ship in the dock. However, the unfortunate aspect of it is that on the west coast, in region 10, we have just received communication from the recently appointed region 10 director that OSHA will no longer make investigations on the dock nor on the ship.

Now, this seems to be an in-house decision by OSHA, obviously approved by Washington. We have written the director in Seattle a letter from our union in Portland, asking him the following question: "Does your position and directive to your people within your agency mean that you will no longer instigate investigations, or you will no longer reply to requests for investigations?"

The answer—and that letter was sent out about a month and a half ago—still has not arrived at our office. But the fact is, OSHA no longer comes on the waterfront, I guess by internal directive.

Senator NICKLES. Thank you, gentlemen. We are going to have to move on.

Let me offer this, because I know I have some additional questions, and I think Senator Williams probably does. If you have additional comments that you want made on the record, please enter them, and we will chew on them. I have another set of questions that I think can help develop the issues that we are discussing, particularly getting back into the legislation.

Mr. LEWIS. Mr. Chairman, could I point out just one thing? Mr. Luch and Mr. Krieger came all the way from the west coast to testify at these hearings. I realize that you are under a time constraint, but there is a great deal more that we were hoping to get into the record to tell you about today that we have not even had a chance to touch on yet. Would it be possible for us to have just a few more minutes?

Senator NICKLES. I do not think so.

I will recognize Senator Quayle, who has joined us. Do you have any comments you want to make?

Senator QUAYLE. Mr. Chairman, I just want to commend you for having these hearings. I think that we obviously have some concern.

I would just ask one question, in view of the time. Has there been any talk or consideration about having the States operate the compensation aspect, rather than having a special class, and having the Federal Government, and if so, what has been the response?

Mr. LEONARD. We have had trouble with the States for many years, and this is why we went to the Federal. They do not have the people to do the job. That is the answer, very simple. When Governor Rockefeller and Governor Hughes were in New Jersey, we tried for years, before we got a law passed in 1958. We went to the State bodies, and they refused to go down to the waterfront, because they said the waterfront was under Government jurisdiction.

There are four or five States in the United States who have what they call an OSHA State plan. Two ports in the South have what they call an OSHA plan. We have just stopped it in Baltimore, where they did have a State plan where the State would take care of the docks, and OSHA would come in on the ship. We have now got that worked out that OSHA has charge of the dock and the ship. In almost all of our ports except two, OSHA has complete charge, not the State.

Senator QUAYLE. I was just thinking in this new era of politics that we are entering, where we are trying to have more responsibility in the decisionmaking process at the State and local communities, that we ought to at least discuss the possibility of having the States operate the workmen's compensation as far as the longshoreman is concerned, like it is done for other employees.

Mr. KRIEGER. Senator Quayle, let me point out one thing in the State of California that does involve this bill here. The State of California allows a worker to choose his treating physician after 30 days, and that is something that is proposed to be taken away from us here. Even with State laws, they are generally inadequate compared to the Federal legislation, and they even allow that.

And Senator Nickles, let me just give you some statistics. I know you are interested in those. As a businessman, you pointed out yesterday that you are interested in the statistics, and we see that you are.

We all know that the bottom line in business is productivity and products. Without that you cannot function. And our employer on the west coast is very proud of the productivity that has been going on there in the past 20 years, and so are we. We joined in with that in 1961, in 100 percent cooperation to introduce better mechanization and modernization on the waterfronts, and we have done that. It has produced good statistics.

In 1960, it cost $4.94 per ton to move cargo on the dock. Today, in 1980, even after the double-digit inflationary spiral that we are in, it costs $3.60 a ton—a dramatic reduction in 20 years.

Senator NICKLES. We did not have any statistics that I have heard of yet. We are already 48 minutes into this panel, and we have three panels to go. That is not fair to them, because I do not want to squeeze them into 10-minute panels, so we are going to have to adjourn.

Put your statistics, if you would, please, in the record, so we can have those. And for you also, coming from Portland, I apologize that we let 45 minutes go on the other side, and we did not really get to visit with you. We will take any of your statements for the record. We appreciate your cooperation and look forward to working with you.

Mr. SULLIVAN. Senator Nickles, with your permission, I will not take anymore time of the committee, but I do have a case involving one of Senator Quayle's constituents who, on the 19th of April of this year, a man, 29 years old, whom I was acquainted with, lost his life on a ship in Burns Harbor, Ind., in an accident that was clearly preventable. A mispackaged bundle of odd-sized steel, when it was lifted into the hatch of the ship—the person was doing exactly what he should be doing, standing exactly where he should be, when a piece of steel slipped out from the bundle, cut him in half and killed him. It is that kind of thing that we want to attack. We want to improve the standards of safety and prevent these accidents and thereby reduce the amount of deaths.

Senator NICKLES. I appreciate it. Thank you, gentlemen.

Mr. SULLIVAN. I will supply a copy of that to Senator Quayle.

Senator NICKLES. Senator Williams?

Senator WILLIAMS. Mr. Chairman, the two gentlemen here did not have prepared statements, is that correct?

Mr. LUCH. We gave a prepared statement to staff.

Senator WILLIAMS. You did, all right. Then, I imagine staff would be available to talk with you so that we can understand the statistical material that you are presenting.

Senator NICKLES. Certainly.

Our next two gentlemen are John Sheehan, legislative director of the United Steelworkers of America, and Frank Guillen, dispatcher with local No. 9, Wilmington, Calif., who works with the Industrial Union of Marine and Shipbuilding Workers of America.

To the balance of the panelists, I apologize for the fact that we are going to have to hit and move on. Mr. Sheehan has been before me before, so he knows that we are always under time constraints. And I might mention, too, when we say 5 minutes, we are not talking about for everybody; we are saying that we need about 10 minutes of your comments, and then about 10 minutes of our questions.

Gentlemen, please proceed.

STATEMENT OF FRANK GUILLEN, WELFARE OFFICER, LOCAL 9, OF THE INDUSTRIAL UNION OF THE MARINE AND SHIPBUILDING WORKERS OF AMERICA, ACCOMPANIED BY TOM PERRY, COUNSEL; JIM HARMON, EXECUTIVE SECRETARY; AND KEVIN SULLIVAN; AND JOHN J. SHEEHAN, LEGISLATIVE DIRECTOR, UNITED STEELWORKERS OF AMERICA, ACCOMPANIED BY JOHN HOWER, SUBDISTRICT DIRECTOR, VIRGINIA AREA; CARL HALL, CHAIRMAN, TENNECO LOCAL UNION, NEWPORT NEWS, VA.; DAVID DEMILANO, WASHINGTON STAFF

Mr. GUILLEN. I am Frank Guillen, Mr. Chairman, and with me are my counsel, Tom Perry, representing the east coast, Baltimore; Jim Harmon, my executive secretary for my local; and Kevin Sullivan.

Ladies and gentlemen, thank you for allowing me to appear before you today. I am here to speak in opposition to Senate bill 1182. I promise you I will be brief.

My name is Frank Guillen. I have been a shipyard worker since 1942. For 26 of those 39 years, I have been privileged to be a dispatcher for local 9 of the Industrial Union of Marine and Shipbuilding Workers of America. In that position, I became familiar with the L and H Act. My local is the largest single group covered by the L and H Act in Los Angeles. We have over 6,000 members.

Before I describe the specific ills of S. 1182, I would like to review the basic objectives of any program of workers' compensation.

Historically, employers who were faced with the potentially limitless exposure of a jury system, offered workers the guarantee of a certain, speedy, limited compensation system. Workers agreed to waive the right to seek compensation from their employers for jury verdicts awarding special and general damages. In return, the employers guaranteed the payment of medical expenses and a portion of the workers' loss of wage-earning capacity without regard to fault.

In 1972, employers offered to adjust the L and H Act and proposed a tradeoff of the warranty of unseaworthiness in exchange for increased compensation benefits, uniform jurisdiction, and free choice of medical care.

The employers' stated reasons for this "desperately needed relief" was to: One, avoid the burden of excessive costs, and two, discourage abuse of the system by tainted workers, lawyers, and/or doctors.

This "desperately needed reform" was adopted by Congress in November 1972.

With this background in mind, I now come to S. 1182.

First, you have been told that S. 1182 will "correct the inequities of the Longshore Act's costly and confusing 1972 amendments."

Let us examine that statement. The proponents of this bill have provided you with a great deal of information on insurance costs. Have they ever come forward with figures on profit? This is the real issue.

Please do not misunderstand me. Workers are not opposed to employers making profits. We fully realize that it is extremely important.

What we are opposed to is injured workers and their families being deprived of fair benefits in order to increase profits to employers. How can workers be asked to accept a very real reduction in benefits if that reduction goes directly into the coffers of the employers? Nothing imaginable could be more inequitable.

Second, you have been told, "The Longshore Act, thanks also to the 1972 amendments, has no clear jurisdictional lines."

Is the solution to return to the pre-1972 crooked lines of jurisdiction that covered a man, not based upon the work he is doing nor his employer's business, but rather where he happens to be standing at the moment of his injury? What about the tradeoff of unseaworthiness for uniform jurisdiction?

Third, you have been told that "the benefits structure invites abuse of the system, because benefits are high and easy to obtain."

In my 39 years with local 9, I know of not a single indictment of a shipyard worker for abusing the system. Be that as it may, if there is abuse of the system, I suggest to you that it is because of human nature. In every group, there will be those who take advantage. We all agree that they should be punished. However, all workers should not be presumed guilty of abuse because "benefits are high and easy to obtain."

I wish someone could explain to my injured workers how a benefit of two-thirds of their actual wage is an excessively high benefit.

"Easy to obtain"—I have worked with the system, and I can document the seemingly systematic claims-handling technique of starving a man out.

I have addressed myself so far to the alleged reasons for reform. I respectfully submit that these reasons seem to be identical to those put forth in 1972. My suspicion is that they have been put forth with the same objective in mind.

With regard to the specific provisions of S. 1182, I would like very quickly to point out: One, nothing could be more unjust or degrading than being forced to accept a company doctor; foisting the coming asbestosis crisis off on the States is inconceivable; two, repealing the presumptions and shifting the burden of proof returns us to a 19th century view of workers' compensation; and three, reducing compensation benefits, widows' benefits and changing a spinal injury into a scheduled award makes a shambles of the underlying theory of this compensation system.

Finally, I have not belabored you with statistics or arguments that you have all heard before, but I am prepared if you wish to discuss specifics.

I would like to conclude by stating that if S. 1182 is passed in its present form, Congress will be asking workers to accept a scheme of things that destroys the historical compromise that labor and management agreed to in adopting workers' compensation laws.

S. 1182 as it now stands is not a step forward in social evolution, but a fundamentally regressive attempt to save costs at the expense of the injured maritime worker.

Last but not least, I would like to thank Senator Kennedy and his staff, because without his assistance, I would not have been accommodated by the subcommittee today.

Thank you.

Senator NICKLES. Thank you, Mr. Guillen.

[The following material was subsequently supplied for the record:]

ASHCRAFT & GEREL
ATTORNEYS AND COUNSELLORS AT LAW
SUITE 700
2000 L STREET, N. W.
WASHINGTON, D. C. 20036
(202) 783-6400

DISTRICT OF COLUMBIA
LEE C. ASHCRAFT
MARTIN E. GEREL
LEONARD J. RALSTON, JR.
LAWRENCE J. PASCAL
JAMES A. MANNINO
J. HUNT BRASFIELD
MARK L. SCHAFFER
ROBERT B. ADAMS
WAYNE M. MANSULLA
JAMES F. GREEN
THOMAS F. SANTER
WILLIAM F. MULRONEY
DAVID M. LaCIVITA
ALLEN J. LOWE
TIMOTHY F. X. CLEARY
WILLIAM C. BURGY
PATRICK S. GUILFOYLE
KEVIN B. BYRD
MICHAEL H. FELDMAN
MICHAEL V. KOWALSKI
KARL N. MARSHALL
ROBERT A. TAYLOR, JR.
ROBERT P. ENDERLE
PETER J. VANGSNES
JAMES M. HANNY

ROCKVILLE, MD. 20852
SUITE 1002
ONE CENTRAL PLAZA
11300 ROCKVILLE PIKE
(301) 770-3737

ALEXANDRIA, VA. 22304
SUITE 220
4660 KENMORE AVENUE
(703) 751-7400

LANDOVER, MD. 20785
METRO 400 BLDG.
4301 GARDEN CITY DRIVE
(301) 459-8400

BALTIMORE, MD. 21202
SUITE 605
10 EAST BALTIMORE STREET
(301) 539-1122

BOSTON, MASS. 02109
60 STATE STREET
(617) 720-2272

MARYLAND
MARTIN E. GEREL
LEONARD J. RALSTON, JR.
MARK L. SCHAFFER
THOMAS F. SANTER
ROBERT G. SAMET
DAVID M. LaCIVITA
ALLEN J. LOWE
PETER T. NICHOLL
JOHN E. SUTTER
CLIFFORD B. SOBIN
BARRY M. CHASEN
ALAN B. GROSS
JAMES M. HANNY

VIRGINIA
LEE C. ASHCRAFT
LAWRENCE J. PASCAL
J. HUNT BRASFIELD
WAYNE M. MANSULLA
PETER M. SWEENY
BARRY A. STIEFEL
MARK T. DALY, JR.
JULIA H. BUTLER

July 14, 1981

James Powell, Editor
Senate Committee on Labor
and Human Resources
4230 Dirksen Building
Washington, D. C. 20510

Dear Mr. Powell:

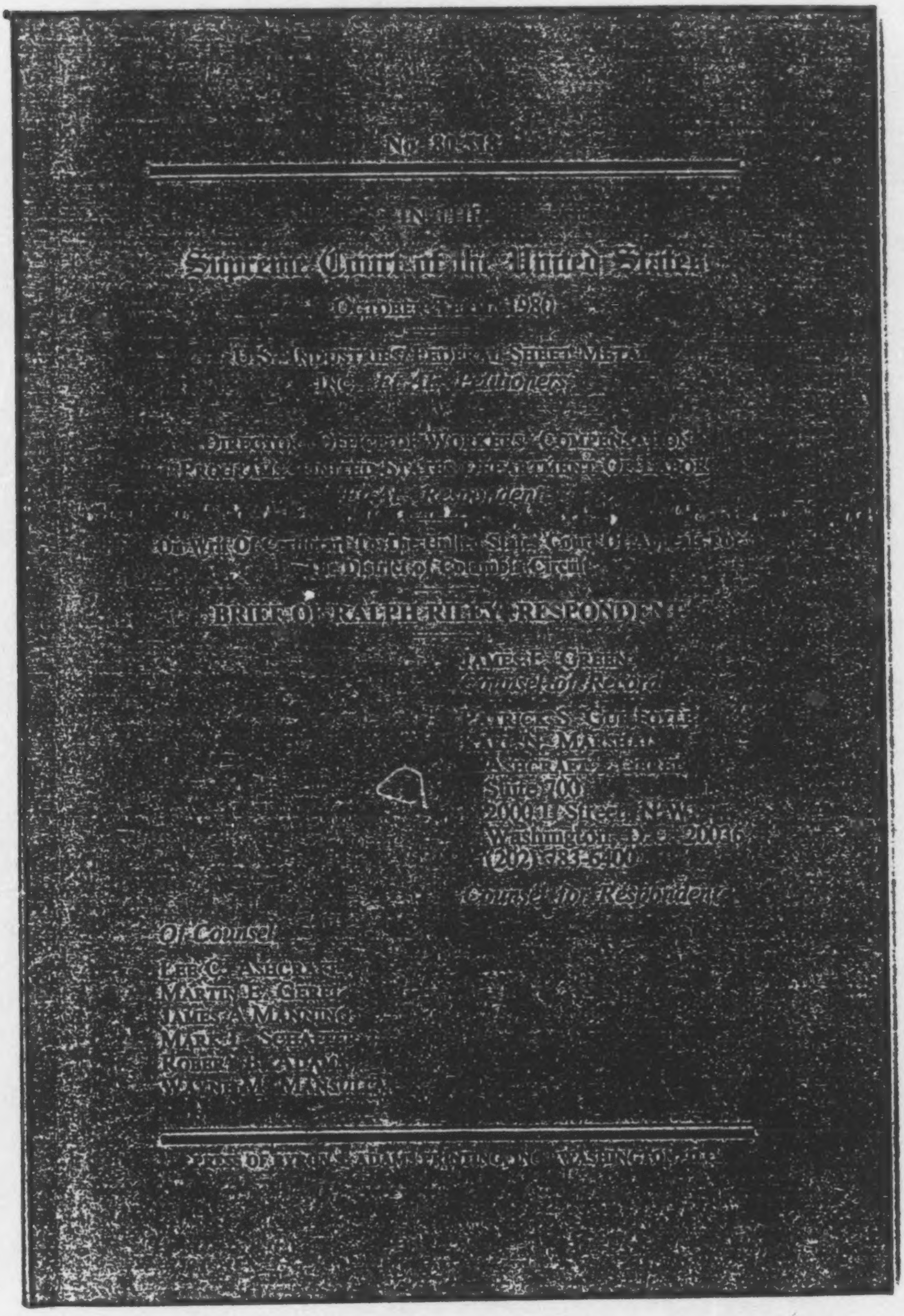
Enclosed herewith please find a copy of a brief directed to the Supreme Court along with a letter from the Industrial Union of Marine and Shipbuilding Workers of America. I would appreciate it if these items would be included in the record as part of the proceedings before this committee.

I fully expect to have additional information and data which I will forward to you as soon as possible.

Very truly yours,

Mark L. Schaffer

MLS:meo
Enclosures



No. 80-518

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

U.S. INDUSTRIES/FEDERAL SHEET METAL,
INC., ET AL., *Petitioners*,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
ET AL., *Respondent*

On Writ Of Certiorari To The United States Court Of Appeals For
The District of Columbia Circuit

BRIEF OF RALPH RILEY, RESPONDENT

JAMES E. GREEN
Counsel of Record

PATRICK S. GUILFOYLE
PAUL N. MARSHALL
ASHCRAFT & GEREL
Suite 700
2000 L Street, N.W.
Washington, D.C. 20036
(202) 783-6400

Counsel for Respondent

Of Counsel:

LEE C. ASHCRAFT
MARTIN E. GEREL
JAMES A. MANNINO
MARK L. SCHAFFER
ROBERT B. ADAMS
WAYNE M. MANSULLA

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Whether the presumption of Section 20(a) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 920 (a), "that the claim comes within the provisions of this Act," requires an employer to adduce evidence showing the absence of a causal relationship between the worker's disabling condition and his employment.

2. Whether an employer can overcome the presumption of employment-relatedness of a worker's disabling condition by evidence that an alleged specific accident while at work did not occur, without addressing with substantial evidence, the relationship between the condition and the general activities of the employment.

INDEX

PAGE

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

COUNTERSTATEMENT OF THE CASE 4

ARGUMENT 8

- I. The Presumption Of Section 20 (a) Of The Longshoremen's Act Applies To The Employment-Relatedness Of The Claimant's Disabling Condition. 8
  - A. Statutory Framework. 8
  - B. Established Construction of the Provision Adopted by Congress. 10
  - C. Congressional Understanding in Enacting Section 20 (a) 12
  - D. Judicial Precedent under the Longshoreman's Act. 14
- II. The Presumption Governs Where The Circumstances And Evidence Fairly Suggest An Inference That The Claimant's Disabling Condition Is Causually Related To His Or Her Employment. 17

CONCLUSION 23

APPENDIX A 1a

TABLE OF AUTHORITIES

CASES: PAGE

Banks v. *Chicago Grain Trimmers Association,* 390 U.S. 459 (1968) 22

Cardillo v. *Liberty Mutual Insurance Co.,* 330 U.S. 469 (1947) 14

Carroll v. *Knickerbocker Ice Co.,* 218 N.Y. 435, 113 N.E. 507 (1916) 11

Chludzinski v. *Standard Oil Co.,* 176 App. Div. 87, 162 N.Y. Supp. 225 (1916) 11

Cirello v. *Great Lakes Dredge & Dock Co.,* 231 N.Y. 556, 132 N.E. 886 (1921)(per curiam) 11

Collins v. *Brooklyn Union Gas Co.,* 171 App. Div. 381, 156 N.Y. Supp. 957 (1916) 11

Continental Insurance Co. v. *Byrne,* 471 F. 2d 257 (7th Cir.), *cert. denied*, 406 U.S. 918 (1972) 15, 16

Davis v. *Department of Labor and Industries of the State of Washington,* 317 U.S. 249 (1942) 14

Driscoll v. *Gillen & Sons Lighterage,* 187 App. Div. 908, 173 N.Y. Supp. 825, *aff'd per curiam* 226 N.Y. 12, 123 N.E. 863 (1919) 11

Eldridge v. *Endicott Johnson & Co.,* 228 N.Y. 21, 126 N.E. 254 (1920) 11

Eller & Co. v. *Golden,* 620 F. 2d 71 (5th Cir. 1980) 16

Eschbauch v. *Contractors Pacific Naval Air Bases,* 181 F. 2d 860 (7th Cir. 1950) 15

Evening Star Newspaper Co. v. *Kemp,* 533 F. 2d 1224 (D.C. Cir. 1976) 16

Fleming v. *Robert Gair Co.,* 176 App. Div. 23., 162 N.Y. Supp. 298 (1916) 10

Furlong v. *O'Hearne,* 144 F. Supp. 266 (D. Md 1956) *aff'd O'Hearne* v. *Furlong 240 F. 2d 958 (4th Cir. 1957)* 15

Gardner v. *Director, OWCP,* 640 F. 2d 1385 (1st Cir. 1981) 16

Table of Authorities Continued

CASES:	PAGE
General Dynamics Corp. v. *Benefits Review Board,* 565 F. 2d 208 (2d Cir. 1977)	20
John W. McGrath Corp. v. *Hughes,* 264 F. 2d 314 (2d Cir. 1959), *cert. denied,* 360 U.S. 931 (1959)	16
J. V. Vozzolo. Inc. v. *Britton,* 377 F. 2d 144 (D.C. Cir. 1967)	16
Kobyra v. *Adams,* 176 App. Div. 43, 162 N.Y. Supp. 269 (1916)	10
Lawson v. *Suwannee Fruit & S.S. Co.,* 336 U.S. 198 (1949)	10
Marra Brothers v. *Cardillo,* 154 F. 2d 357 (3d Cir. 1946)	16
McQueeney v. *Sutphen & Hyer,* 16 App. Div. 528, 153 N.Y. Supp. 554 (1915)	10
Newport News Shipbuilding & Dry Dock Co. v. *Director OWCP (Jenkins),* 583 F. 2d 1273 (4th Cir. 1978), *cert. denied,* 440 U.S. 915 (1979)	16
Norris v. *New York Central R. Co.,* 246 N.Y. 307, 158 N.E. 879 (1927)	11
Northeast Marine Terminal Co. v. *Caputo,* 432 U.S. 249 (1977)	8
O'Keefe v. *Aerojet-General Shipyards,* 404 U.S. 254 (1971)	22
O'Keefe v. *Smith, Hinchman & Grylls Associates,* 380 U.S. 359 (1965)	14
Parsons Corp. v. *Director OWCP,* 619 F. 2d. 38 (9th Cir. 1980)	16
P. C. Pfeiffer Co. v. *Ford,* 444 U.S. 69 (1979)	8
Powley v. *Vivian & Co.,* 169 App. Div. 170, 154 N.Y. Supp. 426 (1915)	10
Ridgley v. *Ceres, Inc.,* 594 F. 2d 1175 (8th Cir. 1979)	16

Table of Authorities Continued

CASES: PAGE

Smith v. *A. M. Oesterheld & Son,* 189 App. Div. 384, 179 N.Y. Supp. 10 (1919), *aff'd per curiam* 229 N.Y. 525, 129 N.E. 901 (1920) 11

Swinton v. *J. Frank Kelly, Inc.*, 554 F. 2d 1075 (D.C. Cir.), *cert. denied,* 429 U.S. 820 (1976)........ 9, 15, 18

Travelers Ins. Co. v. *Cardillo*, 141 F. 2d 362 (D.C. Cir. 1944) 8

Ward and Gow v. *Krinsky,* 259 U.S. 503 (1922) 9

Wheatley v. *Adler*, 407 F.2d 307 (D.C. Cir. 1968).. 10, 17, 18

Wynn v. *Kelley,* 223 F. Supp. 875 (D.D.C. 1963) 10

STATUTES:

5 U.S.C. § 556 13

District Of Columbia Workmen's Compensation Act, 36 D.C. Code § 501 (1973) 4

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. (1970) 12

  33 U.S.C. § 902(2) 2, 8, 9, 14, 15, 21, 22

  33 U.S.C. § 902(3) 8

  33 U.S.C. § 903(a) 2, 8, 15

  33 U.S.C. § 903(b) 9

  33 U.S.C. § 912 9

  33 U.S.C. § 920(a) ....*passim*

  33 U.S.C. § 920(b) 9

  33 U.S.C. § 920(c)......................... 3, 9

  33 U.S.C. § 920(d) 3, 9

  33 U.S.C. § 921(c) 3, 21

  33 U.S.C. § 922............................ 21

28 U.S.C. § 1254(1) 1, 3

Table of Authorities Continued

STATUTES: PAGE

Act of March 4, 1927, C. 509, § 20, 44 Stat. 1124 3, 10

New York Workmen's Compensation Law, 1914, C. 41 § 21(1) 10

CONGRESSIONAL REPORTS:

Hearing on Senate Bill 3170 before the House Judiciary Committee; 69th Cong., 1st Sess., 196, 198 (1926) 13

MISCELLANEOUS:

A. Larson, The Law of Workmen's Compensation .

- Vol. 1A § 6.00 (1978) 8
- Vol. 1A § 6.10 (1978) 8
- Vol. 1A § 29 (1979) 8
- Vol. 4A § 95.11 (1979) 20
- Vol. 4A § 95.12 (1979) 20
- Vol. 4A § 95.21 (1979) 20

Washington Star, June 16, 1981 1a, 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-518

U.S. INDUSTRIES/FEDERAL SHEET METAL,
INC., *Et Al., Petitioners,*
v.
DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Et Al., Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

BRIEF OF RALPH RILEY, RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. C 3a-11a) is reported at 627 F.2d 455. The opinion of the Benefits Review Board (Pet. App. D 12a-18a) is reported at 9 B.R.B.S. 936. The opinion of the Administrative Law Judge (Pet. App. E 19a-26a) is not reported.

JURISDICTION

The Judgment of the Court of Appeals was entered on May 22, 1980. A petition for rehearing was denied on July 3, 1980 (Pet. App. A 1a-2a). The petition for writ of *certiorari* was filed on September 30, 1980, and was granted on March 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Code, Title 33:

§902. Definitions

When used in this chapter—

* * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * *

§903. Coverage

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury . . .

* * *

§920. Presumption

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

March 4, 1927, c.509, §20, 44 Stat.1124

§921. Review of Compensation Order

* * *

(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States Court of Appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of title 28, United States Code. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified . . .

United States Code, Title 28:

§1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

District of Columbia Code:

§36-501. Longshoremen's and Harbor Workers' Compensation Act Made Applicable to the District of Columbia.

The provisions of chapter 18 of title 33 U.S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

COUNTERSTATEMENT OF THE CASE

Respondent Ralph Riley worked as a sheet metal worker for thirty-two years (Pet. App. D 12a). On November 19, 1975, while in the employment of U.S. Industries, Riley was working at Walter Reed Hospital hoisting duct work into ceiling trapeze hangers. Riley was working with another sheet metal worker, Howard Sutherland, on a two-tiered scaffold. When the work day was nearly ended and most of the workmen had left, Riley attempted to raise himself to the second level of scaffolding in order to adjust the duct work he and Sutherland were lifting into place (J.A. 21, 22). Riley testified that as he ascended to the higher level, which afforded little room to maneuver (J.A. 9), he hit his neck and shoulders on the overhanging duct work (J.A. 8-10, 15, 21-22). Sutherland, the only eyewitness to the accident, corroborated Riley's account of the accident (J.A. 6-20).

The injury was painful, and Riley immediately took Indocin, a medication that he carried with him for arthritis. Having rested for a short period of time, he left the job site for home. Riley went to bed early because of the pain but awoke about 2:30 a.m. in extremely severe discomfort. Riley awakened his wife and she drove him to the emergency room of La Plata Hospital (J.A. 25, 26).

The initial concern of the attending physician was that Riley was suffering from a heart ailment. While Riley was rushed off for a cardiogram and placed in intensive care, his wife gave his medical history as best she could (J.A. 26). The hospital monitored Riley for three days in an effort to determine the cause of his pain (J.A. 27).

On the fourth day, November 23, 1975, Riley was examined by Doctor Guillermo Sanchez who was eventually able to diagnose Riley's pain as an arthritic neck condition rather than a heart problem (J.A. 83-85, 157). Although Doctor Sanchez's medical history does not mention the accident, Riley testified that he told Doctor Sanchez about the incident (J.A. 44). Furthermore, there is no question that on the first day he returned to work, November 26, 1975, Sutherland reported that Riley's condition was work-related. Sutherland testified that at his first opportunity he "told the guys at work that Mr. Riley had struck his neck and shoulders on the duct" (J.A. 11). This testimony was corroborated by John Fury, the foreman, although he could only vaguely remember Sutherland saying that Riley was hurt on the job (J.A. 11, 77, 78).

Following his discharge from the hospital,* Riley saw Doctor Herbert Wisotsky on December 5, 1975.

---

* It is undisputed that since that hospitalization Riley has been permanently and totally disabled from employment.

Doctor Wisotsky stated that he obtained only a very brief history from Riley at that time. However, Doctor Wisotsky remembered that Riley had related that his injury and hospitalization had been due to an accident at work (J.A. 127, 128). This testimony comports with Riley's statement that he told Doctor Wisotsky about the November 19 accident during his December 5 office visit. (J.A. 57).

In late November or early December, Riley received a phone call from James A. Bettis, an agent for the union of which Riley was a member. Mr.Bettis was calling on behalf of Blackie Brandsfield, the employer's general superintendent, to find out when Riley was returning to work (J.A. 70, 71). Riley was surprised to discover that his employer had taken no action to compensate him for his injury (J.A. 54). Riley informed Bettis he was still receiving medical care and inquired as to the proper insurance carrier to contact. Somewhat later, in mid-December, Riley called James Killeen, another union agent, to inquire further about receiving compensation. Both Bettis and Killeen corroborated the content of these conversations (J.A. 54, 55, 70-75).

When the claimant heard nothing further concerning his compensation request, he sought the advice of an attorney. As a result, a claim form was filed December 29, 1975. Petitioner controverted the claim for compensation under the Act. Following a hearing on the merits, the Administrative Law Judge (hereinafter referred to as ALJ) determined that Riley had not reported the accident to his treating physicians or his employer until after his hospitalization; that Riley and Sutherland had fabricated the story of the accident; and that no such incident had occurred (Pet. App. E, 25a). Without further discussion of Riley's cervical osteoarthritis, the ALJ denied his claim for compensation (Pet. App. E 19a-26a).

Riley appealed to the Benefits Review Board, which affirmed by a two-to-one vote. The Board majority concluded that the ALJ's finding that the alleged accident had not occurred had a reasonable basis in the record (Pet. App. D 12a-16a). Board Member Miller dissented on the ground that "the real issue in this case is not whether claimant sustained an accident at work but whether claimant's injury is causally related to his employment" (*id.* at 17a-18a). Member Miller reasoned that because the ALJ incorrectly focused his attention exclusively on whether the claimant had sustained a particular accident, his decision contained no analysis or findings as to whether the employer had presented sufficient evidence to rebut the presumption contained in Section 20(a) "that the claim comes within the provision of the Act" (*id.* at 18a). Accordingly, he would have remanded the case to the ALJ for further findings (*id.* at 18a).

The claimant filed a petition for review of the Benefits Review Board's decision in the Court of Appeals, and the Director, Office of Workers' Compensation Programs intervened in support of his position. The Court of Appeals reversed the Board's decision and remanded for further proceedings (Pet. App. C 3a-11a). The Court did not question the ALJ's finding that the alleged accident had not occurred. It held instead that the injuries suffered by the claimant [his arthritic neck condition and its sudden exacerbation] might nevertheless have been 'employment-bred' and that the claimant was entitled, by virtue of Section 20(a) of the Act 33 U.S.C. 920(a), to the rebuttable presumption that they were (Pet. App. 10a). Because the ALJ focused exclusively on the occurrence of the alleged accident, however, he had not made the necessary findings.

Accordingly, the Court remanded the case for further consideration, without "anticipat[ing] what these findings will be" (*id.* at 11a).

ARGUMENT

I. The Presumption Of Section 20(a) Of The Longshoremen's Act Applies To The Employment-Relatedness Of The Claimant's Disabling Condition.

A. Statutory framework

The "coverage" provision of the Longshoremen's Act, Section 3(a), 33 U.S.C. 903(a), requires the payment of compensation for "disability or death of an employee, . . . if the disability or death results from an injury. . . .[1] The term "injury," by its definition in Section 2(2) of the Act, 33 U.S.C. 902(2), constitutes the general "employment-relatedness" requirement for compensability, common to all workers' compensation statutes in the same or similar terms. See, generally, 1 A. Larson, *The Law of Workmen's Compensation* §§6.00, 6.10 (1978; 1A *id.* §29(1979)).

---

[1] For purposes of the Longshoremen's Act itself, the term "employee" in Section 3(a) is defined by Section 2(3), 33 U.S.C. 902(3), to include only persons "engaged in maritime employment" subject to certain exceptions. Further, Section 2(a) goes on to require that the "injury" "occurr[ed] upon the navigable waters of the United States (including [adjoining land areas used in maritime operations])." (See, generally, *P.C. Pfeiffer Co.* v. *Ford,* 444 U.S. 69 (1979); *Northeast Marine Terminal Co.* v. *Caputo,* 432 U.S. 249 (1977). These criteria of coverage, known as the "status" and "situs" requirements respectively, are inapplicable to claims brought under the statutory extensions of the Act, such as respondent Riley's under the District of Columbia Worker's Compensation Act (see, *Travelers Ins. Co.* v. *Cardillo,* 141 F.2d 362 (D.C. Cir. 1944)), and are not involved in this case.

It encompasses an "accidental injury *** arising out of and in the course of employment, and such occupational disease *** as arises naturally out of [the] employment ***." Section 2(2).[2]

The presumption in Section 20(a) of the Longshoremen's Act, "[t]hat the claim comes within the provisions of th[e] Act," applies to the question whether the claim satisfies the general compensability requirements of the Act. The other presumptions, Section 20(b), (c), (d), 33 U.S.C. 920(b), (c), (d), relate to affirmative defenses available to the employer under Section 12, 33 U.S.C. 912 (lack of prompt notice of the injury to, or knowledge of it by, the employer) and Section 3(b), 33 U.S.C. 903(b) (causation of the injury by intoxication or by willful intention of the employee). So far as relevant to the present case, Section 20(a) encompasses the general "injury" requirement, that the disabling condition be employment-related. No basis in law exists for petitioner's assertion that Section 20(a) applies only to the "arising out of employment" requirement in cases where the claimant has already established that the injury occurred "in the course of employment."[3]

---

[2] Petitioner asserts that the statutory terms "arising out of and in the course of", form a two-prong test, both elements of which must be met to establish entitlement to compensation (Pet, Br. 13). On the contrary, this interpretation ignores the historical construction of these statutory words. The two-prong test has been described as dicta and treated as such. *Ward and Gow* v. *Krinsky,* 259 U.S. 503 (1922).

[3] Petitioner would extend the presumption only to those claimants who have no need of it. Moreover, as the court in *Swinton* v. *J. Frank Kelly Inc.,* 554 F.2d 1075 (D.C. Cir.), *cert. denied,* 429 U.S. 820 (1976) said: "The statutory presumption applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." 554 F.2d

B. Established construction of the provision adopted by Congress

The law enacted by Congress in 1927[4] drew heavily on the substantive and procedural provisions of New York's workers' compensation law. See *Lawson* v. *Suwannee Fruit & S.S. Co.,* 336 U.S. 198, 205 (1949). See *Wynn* v. *Kelly,* 223 F. Supp. 873 (D.D.C. 1973). New York decisions construing the language which later became Section 20(a) of the Act show that this provision governed not only questions of statutory applicability, but also the general compensability requirement of employment-relatedness.

The presumption of Section 21(1) of the New York Workmen's Compensation Law, enacted in 1914,[5] is identical to Longshoremen's Act Section 20(a). Its initial application was to whether the injured worker's employment was within the law's coverage — "hazardous employments" as enumerated in Section 3(1) of the law. See, *McQueeney* v. *Sutphen & Hyer,* 167 App. Div. 528, 153 N.Y. Supp. 554 (1915); *Kobyra* v. *Adams,* 176 App. Div. 43, 162 N.Y. Supp. 269 (1916). But it was very early applied also to the question whether injuries were "accidental" and "arising out of and in the course of employment," within the law's definition of "injury," Section 2(7). See, *Powley* v. *Vivian & Co.,* 169 App. Div. 170, 154 N.Y. Supp. 426, 431 (1915); *Fleming* v. *Robert Gair Co.,* 176 App. Div. 23, 162 N.Y. Supp. 298 (1916) (occurrence of alleged accident in course of work and causal relationship to proven hernia presumed). The New York Court of Appeals itself cited the Section 21(1)

---

at 1082. See also, *Wheatley* v. *Adler,* 407 F.2d 207 (D.C. Cir. 1968).

[4] Act of March 4, 1927, c. 509, 44 Stat. 1424 (Longshoremen's and Harbor Worker's Compensation Act).

[5] N. Y. Laws 1914, c. 41, Sec. 21(1).

presumption, though it found that it had been overcome, in an early case involving an iceman's alleged injury that witnesses testified had not occurred. *Carroll* v. *Knickerbocker Ice Co.,* 218 N.Y. 435, 113 N.E. 507, 508 (1916). In *Collins* v. *Brooklyn Union Gas Co.,* 171 App. Div. 381, 156 N.Y. Supp. 957 (1916), however, the presumption was held applicable only to statutory coverage questions, not extending to the issue of occurrence of an employment-related accidental injury. *Collins* was later cited with apparent approval by the Court of Appeals in *Eldridge* v. *Endicott Johnson & Co.,* 228 N.Y. 21, 126 N.E. 254, 255 (1920), although the discussion is equally consistent with the view that the evidence overcame whatever effect the presumption had. Nevertheless, the compensation commission and courts continued to rely on the presumption on "injury" questions, particularly in cases in which the circumstances surrounding injuries and deaths could not be definitely ascertained, and the Court of Appeals affirmed. See, *Chludzinski* v. *Standard Oil Co.,* 176 App. Div. 87, 162 N.Y. Supp. 225 (1916), *Driscoll* v. *Gillen & Sons Lighterage,* 187 App. Div. 908, 173 N.Y. Supp. 825, *aff'd per curiam* 226 N.Y. 12, 123 N.E. 863 (1919); *Smith* v. *A.M. Oesterheld & Son,* 189 App. Div. 384, 179 N.Y. Supp. 10 (1919), *aff'd per curiam* 229 N.Y. 525, 129 N.E. 901 (1920); *Cirello* v. *Great Lakes Dredge & Dock Co.*, 231 N.Y. 556, 132 N.E. 886 (1921) (Per curiam). In *Norris* v. *New York Central R. Co.,* 246 N.Y. 307, 158 N.E. 879, 880-881 (1927), the Court of Appeals cited the discussion in *Smith* v. *A.M. Oesterheld & Son, supra,* which was in turn based on application of the presumption in *Driscoll, supra,* with full concurrence. While the *effect* of the presumption has varied somewhat in New York law, its *applicability* to the employment-relatedness question under the definition of "injury" has never been subject to much question.

C. Congressional understanding in enacting Section 20(a)

The scope of the application of the New York law's presumption was not addressed specifically in the hearings leading to enactment of the Longshoremen's Act in 1927, but the broad language and apparent effect of its adoption did not pass unnoticed.

While many objections to the bills's overall coverage were voiced throughout the many days of hearings, a shipyard representative, in protest of the bill's broad coverage described how the Section 20(a) presumption (a feature which was not then common among the existing state compensation acts) would be applied to a typical shipyard worker's injury under the proposed law—

> Here is a man who may work 90 percent of his time upon the construction of a ship on shore as a painter, we will say. Ten percent of his time he might work on the ship and he might become infected with lead poisoning. Now, out of the 90 percent of the time being on shore Virginia expressly excludes any compensation [for occupational disease], but for the 10 percent that he is working on the ship this bill — either the Senate bill or the House bill — would undertake to require us to give him a compensation for occupational disease.
>
> Now, I see there are presumptions [in Section 20]. I should have used that when discussing the question of occupational disease. [In Section 20] you have provided — I am telling you about the difficulty when you come to occupational diseases.
>
> This is the Senate bill. It is Section 20 of [S.] 3170. [Reading:]
>
> In any proceeding for the enforcement of a claim for compensation under this act it shall be presumed in the absence of substantial evidence to the con-

> trary, first, that the claim comes with the provisions of this act.
>
> Then it speaks about the sufficiency of notice and about intoxication. What I want to bring to your attention is [''] that the claim comes within the provisions of this Act.[''] Just as soon as the man that I described, that had been working a few minutes on the boat, who had given all of this time practically to work on the shore, just as soon as he contracts any disease, he will claim that it comes under this act, and the presumption under this act is that it does shifting absolutely the burden of proof. The employer has to prove the negative; and for God's sake tell me how you are going to find out where a man contracted a disease. He can tell you he contracted it in painting some small part of the ship, and under that presumption how in the world are you going to defeat him? Hearing on S. 3170 before the House Judiciary Committee, 69th Cong. 1st Sess. 196, 198 (1926).[6]

Yet the bill was enacted without change in the relevant provision. The witness's testimony, which stood uncontradicted in its description of the presumption's effect, was unequivocally based on the understanding that Section 20(a) would apply to the question of the relationship between the covered employment (that aboard ship) and the disability.[7]

---

[6] Statement made by E.M. Braxton, representing Newport Shipbuilding and Dry Dock Co., the largest employer of labor in the Commonwealth of Virginia. Petitioner and Amicus echo this philisophical concern, contending that the Court of Appeals' pronouncement in *Riley* has opened Pandora's Box so that even the common cold may now be compensable. As Mr. Braxton's testimony makes clear, this tidal wave was cited fifty-five years ago and has yet to reach shore (Petitioner's Br. 24, Amicus Br. 21-25).

[7] Amicus urges that the holding of the Court below is directly contrary to the Administrative Procedure Act, 5 U.S.C. § 556;

D. Judicial precedent under The Longshoremen's Act

This Court has never considered what questions in litigation are subject to the effect of the Section 20(a) presumption. It has, however, invoked the presumption several times. In *Davis* v. *Department of Labor and Industries of the State of Washington,* 317 U.S. 249 (1942), the Court described the presumption as one of "jurisdiction" under the Act, *i.e.*, statutory coverage of the circumstances of the injury, and indicated that it would support an award under the Act in the constitutional "twilight zone" in which the Act's coverage was a close question. 317 U.S. at 256. Again in *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947), the Court described Section 20(a) as applying to the Act's "jurisdiction" of coverage, indicating that it "applies with equal force to proceedings under the District of Columbia Act." 330 U.S. at 474. Far from *limiting* the presumption's scope to coverage questions, the Court has also invoked it in support of an award where the sole question was the employment-relatedness of a worker's death. In *O'Keeffe* v. *Smith, Hinchman & Grylls Associates*, 380 U.S. 359 (1965), the contested issue was whether the worker's death met the Section 2(2) definition of "injury," *i.e.*, whether it "ar[ose] out of and in the course of employment." The Court quoted the Act's allocation of fact-finding authority to the deputy commissioners (now administrative law judges), its limitations on judical review, *and the Section 20(a) presumption*, and indicated that all three operate to "limit the scope of judicial review of the [factfinder's]

(Amicus Br. 23). The cited section states: "*Except as otherwise provided by statute,* the proponent of a rule or order has the burden of proof" (emphasis supplied). Implicit in the decision on appeal is an understanding that Congress had, in fact, "otherwise provided" when it drafted Section 20(a).

determination that a 'particular injury arose out of and in the course of employment.' " 380 U.S. at 361. Clearly the Court understood the presumption to apply to the question as to whether the disabling condition or death constituted an "injury" as defined in Section 2(2), rather than just to the *other* element of statutory "coverage" in Section 3(a).

Legislative history and precedent thus confirm that the presumption of Section 20(a) "that the claim comes within the provisions of this Act" was not intended to be, and never has been, limited in its effect to questions of statutory coverage of the type and place of employment involved. It applies as well to disputes about the employment-relatedness of the worker's disabling condition or death, *i.e.,* whether it constitutes an "injury" as defined in Section 2(2).[8] Despite scattered dicta to the contrary, the Courts of Appeals have recognized this proposition. See, *Swinton* v. *J. Frank Kelly, Inc.*, 554

---

[8] Petitioner attaches much significance to *Eschbach* v. *Contractors Pacific Naval Air Bases,* 181 F.2d 860 (7th Cir. 1950), in which the 7th Circuit declined to extend the Section 20(a) presumption to the question of causality. However, the Circuit's interpretation of this provision is equivocal at best, for it was later to hold: "We begin with the proposition that where there is a doubtful factual question as to whether an injury arises out of employment, the law presumes compensability." *Continental Insurance Co.* v. *Byrne,* 471 F.2d 257 (7th Cir. 1972), *cert. denied,* 406 U.S. 918 (1972). Moreover, Petitioner and Amicus cite the Fourth Circuit decision in *Furlong* v. *O'Hearne* 144 F. Supp. 266 (D. Md. 1956), aff'd. 240 F.2d 958 (4th Cir. 1957). But it should be noted that the principle there is wholly inapposite to the instant case. While the District Court in *Furlong* held that the presumption in Section 20(a) does not relieve the claimant of the necessity of proving injury, this was dicta in light of the fact that the claimant introduced uncontradicted evidence of injury. On appeal, the lower court was affirmed in an opinion which did not address the presumption issue.

F.2d 1075, 1082 & n.34 (D.C. Cir.), *cert. denied,* 429 U.S. 820 (1976); *J.V. Vozzolo, Inc.* v. *Britton,* 377 F.2d 144, 149 (D.C. Cir. 1967); *Gardner* v. *Director, OWCP,* 640 F.2d 1385, 1388, 1391 (1st Cir. 1981); *John W. McGrath Corp.* v. *Hughes,* 264 F.2d 314, 314 (2d Cir.), *cert. denied,* 360 U.S. 931 (1959); *Marra Bros.* v. *Cardillo,* 154 F.2d 357, 359 (3d Cir. 1946); *Newport News Shipbuilding & Dry Dock Co.* v. *Director, OWCP (Jenkins),* 583 F.2d 1273, 1278-79, (4th Cir. 1978), *cert. denied,* 440 U.S. 915 (1979); *Eller & Co.* v. *Golden,* 620 F.2d 71, 73 (5th Cir. 1980); *Continental Insurance Co.* v. *Byrne,* 471 F.2d 257, 260-61 (7th Cir.), *cert. denied,* 406 U.S. 918 (1972); *Ridgley* v. *Ceres, Inc.,* 594 F.2d 1175, 1177 (8th Cir. 1979); *Parsons Corp.* v. *Director, OWCP,* 619 F.2d 38, 40-41 (9th Cir. 1980).[9] Petitioner suggests no basis in law or policy for disturbance of this settled view of the broad application of the Section 20(a) presumption to employment-relatedness issues.[10] The Court of Appeals' invocation of the presumption in Riley's aid on the question of the employment-relatedness of his disabling cervical-spine condition was proper.

---

[9] Petitioner citing *Evening Star Newspaper Co.* v. *Kemp* 533 F.2d 1224, 1234 (D.C. Cir. 1976), perceives a contradiction within the District of Columbia Circuit on the presumption question. The language which petitioner so liberally quotes (a dissenting opinion) neither addresses the presumption nor represents the holding of the court (See Pet. Br. 20).

[10] Amicus opines that even without the expansion of the statutory presumption, the cost and impact of workers'compensation is profound (Amicus Br. 22-23). Amicus illustrates this contention with reference to fiscal woes suffered by the Washington Metropolitan Area Transit Authority (WMATA) as a result of compensation claims. It appears that WMATA has begun to solve the problem by being more mindful of safe working conditions (See Appendix A).

II. The Presumption Governs Where The Circumstances And Evidence Fairly Suggest An Inference That The Claimant's Disabling Condition Is Causally Related To His Or Her Employment.

Section 20(a) does not say what showing must be made by a compensation claimant in order to give rise to the presumption. Indeed, its introductory terms — "In *any proceeding* for the enforcement of a claim for compensation under this Act" (emphasis supplied) — suggests that it places the burden of coming forward with "substantial evidence," negating the compensability of the claim, on the employer at the outset. In practice, however, this suggestion is never acted upon; claimants come forward with their supporting evidence at the outset of formal hearings under the Act, although employers and their insurance carriers understand that they must come forward with evidence to overcome the effect of the presumption regardless of how weak the claimant's proof may be. Accordingly, there is very little precedent regarding what must be shown before it becomes incumbent on the employer to present "substantial evidence to the contrary" in order to avoid the controlling force of the presumption.

Whatever little judicial precedent exists, however, provides a perfectly adequate standard, which appears to be consistent with the decision below. In *Wheatley* v. *Adler*, 407 F.2d 307 (D.C. Cir. 1968) *en banc* the Court reasoned:

> The possibility that Wheatley's death was due to urinating-in-the-cold is not a mere fancy or wisp of "might have been" like the musing of the old judge in Whittier's poem who was enchanted by the sight of Maud Muller. It was volunteered by Dr. Thomas as a realistic possibility providing meaningful perspective for his opinion. This certainly sufficed, in

> the light of the statutory presumption, to require substantial evidence in refutation, at least to articulate that this possibility was improbable — if he could say that it was improbable.

407 F.2d at 313.

And in *Swinton* v. *J. Frank Kelly, Inc.* 554 F.2d 1075 (D.C. Cir.), *cert. denied,* 429 U.S. 820 (1976), the Court relied on *Wheatley's* reasoning:

> [T]he statutory presumption may be dispelled by circumstantial evidence specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event. It cannot be said, however, that the evidence in this case rose to that level. Here, as in *Wheatley,* no medical expert offered any opinion as to causality; no expert espoused a view that the back ailment was not bred or intensified by his fall. And surely the evidence, such as it was did not of its own force serve to disestablish the possible affinity of the two.
>
> The caliber of proof, if circumstantial, which the statutory presumption demanded is shaped in part by the fact that here, as in *Wheatley*, the thesis that Swinton's current affliction arose from the accident is "not a mere fancy or wisp of 'might have been.' "

554 F.2d at 1083.

The standard of *Wheatley* and *Swinton* may be taken to mean that "specific and comprehensive" evidence, sufficient to justify a finding adverse to the claimant with respect to a "potential connection" between the disabling condition and the employment, need only be produced by the employer with respect to a "potential connection" which is fairly inferable from, or suggested by, the record evidence. In practice, it makes little difference whether the presumption is regarded as applicable to *any* potential causal link to the employment or only to such a connection that has some degree of record support as contemplated by *Wheatley* and *Swinton.* Where such support is lacking, certainly mere *general* negative evidence will suffice to rebut the presumption, whereas greater particularity can reasonably be required of the employer's evidence to the contrary where the record contains support for a particular theory of causal connection.

The Court of Appeals herein did not decide the degree of evidence necessary to require rebuttal, nor did it determine the requisite specificity of the rebuttal. Like the dissenting member of the Benefits Review Board, it found no need to address those issues because both the employer's evidence and the ALJ's findings concerned exclusively the question whether the alleged accident on November 19, 1975 had in fact occurred. The ALJ found that no such accident happened. That finding was a permissible inference from the employer's disputed evidence, which the ALJ credited, that neither Riley nor his co-worker had informed anyone of the accident until some days later, and the Court of Appeals afforded that finding the full deference to which it was entitled. Rather than impermissibly disturbing the ALJ's finding, the Court held that it was "not responsive to the issue properly presented for resolution" (Pet. App. 10a) — the more general question whether Riley's disabling condition of cervical arthritis is employment-related. On this question the employer presented no evidence whatsoever; the record may be searched in vain for any medical or other evidence indicating, specifically or even in the most general terms, that the condition was unrelated to Riley's work.

On the other hand, the "potential connection" between Riley's neck condition and his employment is suggested by the circumstances of the case. Riley was employed as a sheet metal worker for some thirty-two years (Pet. App. 13a).[11] The record contains several descriptions of the nature of his duties installing overhead sheet metal duct work; it is performed in large part from below (See, J.A. 6, 20, 21). Anyone who has ever spent five minutes painting a ceiling or replacing a light bulb in a ceiling fixture is familiar with the proposition that overhead work puts a strain on the neck. Of course the inference that thirty-two years of such work might cause, contribute to, aggravate, or accelerate the development of cervical osteoarthritis may well be medically unwarranted, and despite petitioner's failure to produce any evidence on the point, the Court of Appeals has extended the employer the opportunity to present such evidence on remand if it can.[12] But the possibility of such a relationship can fairly be inferred from the nature of Riley's employment and his disabling condition. This realistic possibility is enough to require the employer to produce at least some "evidence to the contrary." Petitioner has not done so.

---

[11] Under the long-established "last employer" rule, the duration of the worker's tenure with the particular employer against whom the claim is filed is immaterial. If the employer is the last in whose employ the worker was subject to the conditions of employment that produced the occupational disease, it is liable in full for the disability caused by the disease. See, *General Dynamics Corp.* v. *Benefits Review Board,* 565 F.2d 208 (2d Cir. 1977). See, generally, 4 A. Larson, *The Law of Workmen's Compensation* §§ 95.11, .12, .21 (1979).

[12] Petitioner correctly described the question for the ALJ on remand in its Reply to the respondents' brief in opposition to the Petition for Certiorari:

> Upon remand the Administrative Law Judge is to decide now whether Riley's [condition] was precipitated or aggravated by the ordinary conditions of his employment as a sheet metal worker and to consider the applicability of the presumption of causal relationship as applied [sic] to the facts of this case.

Pet. Reply Br. at 9 (citation omitted).

Even if such a lay inference of a causal relationship, based on common experience and the circumstances of the case, should be regarded as a less than compelling ground in itself for invocation of the Section 20(a) presumption, the Court of Appeals was correct in applying the presumption to the alternative potential connection on the record in this case. For the record contains the testimony of two medical witnesses, both of whom directly supported the proposition that the nature of Riley's duties, requiring "overhead type" exertion and "involv[ing] quite a bit of hyperextension of the neck," at least aggravated Riley's condition (J.A. 130, 158, 162). Yet the ALJ made no reference to this alternative potential causal link between Riley's condition and his employment.

Petitioner notes that Riley placed no positive reliance on an occupational-disease theory at the hearing before the ALJ. (Pet. Br. 11). This aspect of trial strategy resulted from full confidence that Riley's assertion of the occurrence of an accident on November 19, 1975 would be accepted. In any event, the absence of a clearer assertion of an occupational-disease theory at the first hearing would not preclude his presentation of such a theory at a new hearing even were this Court to reverse the Court of Appeals and reinstate the ALJ's original decision. By virtue of Section 22 of the Longshoremen's Act, 33 U.S.C. 922, determinations under the Act have only the most limited finality. On the assertion that the ALJ was mistaken in his determination that Riley's condition is not an "injury" within Section 2(2), Riley is entitled to reopen his claim and present new evidence, regardless of its availability at the time of the earlier hearing. *O'Keeffe* v. *Aerojet General Shipyards,* 404 U.S. 254 (1971). *Banks* v. *Chicago Grain Trimmers Ass'n,* 390 U.S. 459 (1968). Nothing precludes him from presenting even an entirely new theory in support of his claim in Section 22 modification proceedings. The Act contemplates such modifications; petitioner's assertion that the Court of Appeals was wrong to consider the potential work-relatedness of Riley's injury ignores this important right under the law. The ALJ's findings and discussion are, as the Court of Appeals reasoned, facially inadequate for resolution of the work-relatedness issue. The record is replete with evidence dispositive of the connection between the claimant's injury and the nature of his employment. That claimant did not rely expressly on the work-relatedness theory does not vitiate the ALJ's duty to answer the whole question before him — whether the claimant's disability was "caused by an injury" as defined in Section 2(2). As the Court of Appeals held, the ALJ's decision in this case stopped short of answering that question, and thereby erred in failing to accord the Section 20(a) presumption its appropriate role.

CONCLUSION

The Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

James F. Green
Counsel of Record

Patrick S. Guilfoyle
Karl N. Marshall
Ashcraft & Gerel
Suite 700
2000 L Street, N.W.
Washington, D.C. 20036

Counsel for Respondent

Of Counsel:

Lee C. Ashcraft
Martin E. Gerel
James A Mannino
Mark L. Schaffer
Robert B. Adams
Wayne M. Mansulla

APPENDIX

APPENDIX A

Washington Star, June 16, 1981 pp. at B1, B3

Metro Work Mishaps Cut, Cash Saved

Strong Safety Effort Produces Dividends

By Thomas Crosby
and Elissa Cottie
Washington Star Staff Writers

Metro has been saving millions of dollars through an aggressive safety program that has dramatically reduced the number of accidents on Metrorail construction sites while also reducing insurance costs.

The program has been so successful that Metro officials last week disclosed that they expect to save an estimated $8.3 million in insurance costs for construction next fiscal year.

At one time, construction on the 101-mile Metrorail system was considered one of the most dangerous jobs in the nation, but the transit agency's safety awareness program has cut accidents almost in half, said Don Bunn, a Metro insurance analyst.

Because Metro construction is resulting in fewer accidents, competition has begun for the first time in years among insurance companies vying for the Metro insurance contract. Last year, that contract cost Metro $30 million; next year it will be only $21.7 million.

The brainchild of John S. Egbert, Metro's assistant general manager for design and construction, the safety program was started in June 1978 with cash awards to firms that complete a project with an accident rate below Metro's average for that type of work.

"If a contractor does a typical job, he breaks even," said David Shilling, a project monitor for the $21 million tunneling for the Forest Glen Metrorail station. "If he does lousy, he pays the transit authority and if he does good, he gets a bonus."

Currently, 41 of the 50 Metrorail construction firms are in the program (the other nine began work before the program started).

For example, Metro's average accident rate for tunneling projects is 9.7. The rate is determined by taking the number of lost work days, multiplying it by 200,000 and dividing by the number of man hours worked.

Peter Kiewit and Sons Co., which is boring the hard rock tunnel for Forest Glen, gets $14,000 from Metro for every one-tenth of a percentage point on its safety rate below 9.7. If Kiewit's record is 9.5 when the firm completes work in October, it will receive $28,000 from Metro.

So far, however, the firm has put in 350,000 working hours without a single injury, said Shilling, and may be able to collect as much as $280,000 when the job is done — the maximum Metro agreed to pay for a safe construction job.

"I think it's a good program," said Shilling. "It gives a contractor incentive to do a good job."

During the first several years of Metrorail construction, the transit agency's accident rate exceeded the national average because Metro paid insurance claims and it made no financial difference to contractors if they had a bad safety record.

The attitude among many contractors was "If you're not paying the bill what difference does it make?" said Shilling.

In 1979, Metro paid $38.1 million for construction insurance but for the last three years the safety program has been saving the transit agency about $7 million a year, said Delmar Ison, Metro's insurance director.

"In 1977 we woke up to the fact that we had to get these high-level benefits (for injured workers) under control," said Ison, who added that awareness of safety has permeated the entire construction hierarchy, from the workers to the company owners.

With fewer workers being injured, Metro has to pay fewer Workmen's Compensation claims. In the District, Workmen's Compensation claims are the second highest in the nation (Alaska is higher), but with fewer claims being made, insurance companies are willing to reduce their premiums to insure the approximately 6,000 workmen building the subway.

Industrial Union of Marine and Shipbuilding Workers of America

AFL-CIO

FRANK DERWIN, President
ARTHUR E. BATSON, JR., Vice-President-
Secretary Treasurer

General Executive Board
1126—16th Street N.W., Washington, D.C. 20036
Area Code 202—223-0902

June 23, 1981

Dear Senator:

I was present at the hearings on Amendments to Longshoreman's and Harborworkers Act held in the Senate Building on June 16,1981. During that session an Attorney, Mr. Gardner, testifying on behalf of Braswell Shipyard, formally of Boston, Mass., stated that the major reason for closing the shipyard was the high cost of Compensation Insurance.

I must take exception with that statement. The closing of the Shipyard came as a result of Management problems one of which was lack of competence as stated by J. Burke, Contracting Officer COMSCLANT , Bayonne, N.J.(see attached)

An attempt was made by my Union to prevent the U.S. Truett's removal from Braswell yard. (see attached mailgram). Unfortunately the ship was removed and given to the Bethlehem Steel East Boston Shipyard. Braswell Shipyard.subsequently closed and the jobs were lost.

One point of interest is that during the first three years of Braswell's operation in Boston new employees were not given physicals which is not a normal hiring practice for most shipyards. By cutting corners in hiring Braswell may have incurred compensation claims that could have been avoided.

Another point is that Braswell location has since been taken over over by General Ship, a long standing company in East Boston. General Ship is operating in both areas and growing rapidly. They are also under contract to my Union.

I hope you and your committee will take a close look at the false statements made by Braswell's Representatives as a means to change a law that is very important to the welfare of the Shipyard Workers.

Sincerely yours,
Arthur E. Batson Jr.
Arthur E. Batson, Jr.
Vice President - Secretary Treasurer

AEB/las

General Executive Board Members
PASQUALE BALDASSARRE, FAUST DiCARLO, RICHARD DIX, ARTHUR DURAND, WILLIS GROCE, LEROY HAWES, CORNELIUS HORGAN, ODELL HOSE, HARVEY LINEBERRY, JOHN REILLY, MURPHY THORNTON, JEARIAL TIGER

TA 131
GOVT TELTEX PD GRIFFISS AFB NY MSG NR 091633 1903L
BRASWELL SHIPYRDS INC
300 NORTHERN AVE
BOSTON MA
P1

426-1722 DLR BY MSNGR

P 091633Z MAR 79 //NC4330//L4E
A. USNS BOWDITCH CONTRACT NO. N00033-73-C-0307, JOB ORDER NO. 79-C-328
SPEC. NO. A79-0910
FOR THE PERSONAL ATTENTION OF MR. E. S. BRASWELL, PRESIDENT

1. REFERENCE IS MADE TO TELEPHONE CALL OF 0906 7 MARCH 1979 FROM E.S. BRASWELL, PRESIDENT BRASWELL SHIPYARDS INC. TO J. BURKE, CONTRACTING OFFICER AND YOUR TELEGRAM OF 7 MARCH TELEPHONICALLY RECEIVED 0945 ON 8 MARCH 1979 FROM H. GERHOLD.

2. TO RECEIVE A REQUEST FOR A 10 DAY EXTENSION OF THE SUBJECT JOB ORDE TWENTY-SIX HOURS BEFORE THE CONTRACT WAS TO COMPLETE IS TO SAY THE LEAST LUDICROUS. THE FACT THAT YOU CLAIM THE MANAGEMENT AND SUPERVISION OF YOUR BOSTON FACILITY EQUALLY MISLED YOU ON FRIDAY 2 MARCH BY STATING THAT THE WORK WOULD COMPLETE ON TIME, IS OF LITTLE CONSOLATION TO THIS CONTRACTING OFFICER.

3. HISTORICALLY ON ALMOST EVERY JOB ORDER UNDERTAKEN AT YOUR BOSTON FACILITY IT HAS BEEN NECESSARY FOR MSC CONTRACTING AND ENGINEERING PERSONNEL TO INVITE THE CONTRACTORS ATTENTION TO THE FACT THAT THE PERFORMANCE WAS SUCH THAT THE COMPLETION DATE COULD NOT BE MET. THE MANAGEMENT AND SUPERVISION AT YOUR BOSTON FACILITY HAVE USUALLY PROTESTED THAT THEY WERE NOT LATE AND WOULD MEET THE SCHEDULED COMPLETION DATES ONLY TO RESULT IN A REQUEST FOR AN EXTENSION LATE IN THE CONTRACT PERIOD.

4. I HAVE PREVIOUSLY COMMUNICATED TO YOU AND TO YOUR EXECUTIVE VICE PRESIDENT ON SEVERAL OCCASIONS THE OBSERVED LACK OF COMPETENCE ON THE PART OF THE MANAGEMENT OF YOUR BOSTON FACILITY. THESE COMMUNICATIONS HAVE USUALLY BEEN MET WITH EMPTY PROMISES AND MERE WORDS. THE FACT REMAINS THAT THE LEVEL OF COMPETENCY OF THE MANAGEMENT AT THE BOSTON SHIPYARD STILL IS INADEQUATE. THIS IS ONCE AGAIN BORNE OUT BY THE FACT THAT DESPITE THE CONTRACTING OFFICERS REPRESENTATIVES ADVISING YOUR PEOPLE URING THE WEEK 26 FEB 1979 THAT THE CONTRACT WAS BEHIND SCHEDULE AND COULD NOT COMPLETE ON TIME, YOUR MANAGEMENT PEOPLE AT BOSTON INSISTED AS LATE AS FRIDAY 2 MARCH THAT THE CONTRACT WOULD COMPLETE ON TIME. YOU HAVE ADMITTED TO ME THAT ON THAT DATE YOU RECEIVED SIMILAR ASSURANCES.

RXBZXX —

5. THE CONTRACTING OFFICER DIRECTS THAT YOU PROCEED AS EXPEDITIOUSLY POSIBLE AND COMPLETE THE SUBJECT CONTRACT AT THE EARLIEST DATE. THE MATTER OF LATE COMPLETION WILL BE ADDRESSED SUBSEQUENT TO THE COMPLETION OF THE JOB ORDER.

6. FURTHER, THE CONTRACTING OFFICER IS CONSIDERING FORWARDING A RECOMMENDATION TO REMOVE YOUR BOSTON FACILITY FROM THE APPROVED LIST OF RESPONSIBLE BIDDERS BASED UPON REPEATED AND CONTINUED FAILURE TO PROVIDE COMPETENT MANAGEMENT AT THAT FACILITY.

SIGNED J BURKE CONTRACTING OFFICER COMSCLANT BAYONNE NJ
NNNN
WJ TELTEX PSN

LGRAM SERVICE CENTER
DDLETOWN, VA. 22645

western union Mailgram

4-027441S264002 09/21/79 ICS IPMMTZZ CSP WSHB
1 2022230902 MGM TDMT WASHINGTON DC 09-21 1120A EST

SEP 24 1979

INDUSTRIAL UNION OF MARINE AND SHIP BUILDING WORKERS OF AMERICA
1126 16TH ST NORTHWEST
WASHINGTON DC 20036

THIS MAILGRAM IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:

2022230902 TDMT WASHINGTON DC 118 09-21 1120A EST
PMS HONORABLE JAMES WOOLSEY, ACTING SECRETARY OF THE NAVY
PENTAGON
WASHINGTON DC

I UNDERSTAND THAT YOU ARE NOW CONSIDERING WHETHER TO TERMINATE BRASWELL SHIPYARD'S CONTRACT TO OVERHAUL THE U.S. TRUETT IN BOSTON MORE THAN 400 SHIPYARD WORKER JOBS WOULD BE IMMEDIATELY LOST IF TERMINATION OCCURS, I BELIEVE SEVERAL HUNDRED SUB-CONTRACTOR JOBS WOULD ALSO BE LOST OUR UNION BELIEVES THAT THE CONSEQUENCES OF YOUR DECISION REQUIRES THAT EVERY RESPONSIBLE STEP BE TAKEN TO INSURE THAT ALL SIDES HAVE BEEN HEARD, I, THEREFORE, URGE YOU TO GRANT BRASWELL'S REQUEST FOR A 10 DAY REVIEW PERIOD, THIS UNION IS FULLY COMMITTED TO SEEING THAT YOUR DECISION IS MADE ONLY AS A RESULT OF A FAIR AND OPEN PROCESS IN WHICH ALL SIDES ARE GRANTED THE FULL OPPORTUNITY TO DISCUSS ALL ISSUES. SINCERELY YOURS

ARTHUR E BATSON JR, VICE PRESIDENT SECRETARY TREASURER INDUSTRIAL UNION OF MARINE AND SHIP BUILDING WORKERS OF AMERICA 1126 16TH ST NORTHWEST WASHINGTON DC 20036

11:20 EST

MGMCOMP MGM

TO REPLY BY MAILGRAM, SEE REVERSE SIDE FOR WESTERN UNION'S TOLL - FREE PHONE NUMBERS

Senator NICKLES. Mr. Sheehan, do you have any comments?

Mr. SHEEHAN. Thank you, Mr. Chairman. I will have some very brief comments, and if you will permit, we can introduce all our written material into the record.

Senator NICKLES. Please do.

Mr. SHEEHAN. Before that, I would like to say that I am accompanied by, on my right, John Hower, who is staff subdistrict director in the Virginia area. Next to him is Carl Hall, the Tenneco Newport-News plant, at Norfolk, who is the chairman of the workmen's compensation committee for the local union. Next to him is David Mullino, from our Washington staff.

This morning in the Washington Post, there appeared an article on this bill, and the last sentence of the editorial said that, "As leaders of organized labor prepare their response, they should remember that defending every detail of a runway program does no favor to the cause of responsible labor protection."

I certainly feel that the United Steelworkers of America can agree with that statement. But I must say, it does strain our reasonableness, Mr. Chairman, when we were faced with the content of this bill. I think you yourself would recognize that there were some pretty strong provisions in there that make it difficult, I think, to take a look at a system now, since its original enactment in 1972.

One other comment that I should make by way of introduction is that this is the first time the United Steelworkers of America appears before this committee with regard to the Longshoremen's and Harbor Workers' Act. The reason for that is that since 1972, we have become the bargaining agent for the workers at the plant at Norfolk, which represents about 15,000 shipyard workers and which incidentally, I guess, is one of the major shipyards in the country. So it is under those aspects that we are here today.

We also represent approximately 2,000 other workers covered by this act.

I thought maybe, without really trying to read anything, the best thing is to make a simple statement, and perhaps I ought to just flash it straight out. The major reason for the withdrawal of the shipyard workers from the coverage of the Longshoremen Act, thereby transferring them to the State workers' compensation program, is that the State systems provide less compensation. It is an economic issue, and the reason for our deletion is simply and solely the economic issue.

Now, you have been hearing comments about the State system. Senator Quayle made some comments about it already. Honestly—and I have seen Senator Williams here for years—we have been trying to do something with the State workmen's compensation system. If the State systems were indeed adequate, then the debate over the jurisdictional consistency would be more academic than practical.

Since, however, there is legitimate rationale for shipyard workers to be covered by a Federal compensation system, it is surely inequitable to transfer their compensation claims to State systems which Congress itself so far has decided either to ignore or been unable to approach the question of reforming the State workmen's compensation systems.

And I would say, Mr. Chairman, to lop off this group of workers from the longshoremen plan without yourselves as a committee really attacking the issue of the State workmen's compensation system is, I think, unreasonable.

I do not think I ought to say anything more because certainly, you have already heard these comments with regard to why we oppose the law. I would just make one final comment. It is a really sorry thing to indicate that under this bill, despite the whole new evolvements in the area of occupational disease, that that whole issue is being so totally ignored. The bill says, "Well, throw the issue back to what is going on under the State laws on their occupational disease programs." Honestly, I think that is a disaster. For whichever workers remain under the Longshoremen Act, I think you ought not to bifurcate the system and have their safety under the Federal system and their occupational disease being dictated by whatever the inadequate State plans are with regard to occupational disease.

Thank you.

[The prepared statement of Mr. Sheehan and summary statement follow:]

STATEMENT BY
JOHN J. SHEEHAN, LEGISLATIVE DIRECTOR
UNITED STEELWORKERS OF AMERICA

before the
SENATE LABOR SUBCOMMITTEE

on the
LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT
(S. 1182)

JUNE 17, 1981

Mr. Chairman, members of the Senate Labor Subcommittee, my name is John J. Sheehan and I am the Legislative Director of the United Steelworkers of America.

Our union represents approximately 17,000 workers covered by the Longshoremen's and Harbor Workers' Compensation Act (LHWC). Most USWA members covered by the Act are employed in the shipbuilding and ship repair industry, although some are engaged in other covered maritime activities. By far the largest group of steelworkers covered by the Act are the 15,000 members of USWA Local Union 8888 at the Tenneco shipyards in Newport News, Virginia.

At the outset, let me state that our union is opposed to the amendments proposed by S. 1182. From our point of view, the most damaging features of S. 1182 are:

(1) the elimination of coverage for many workers' currently covered under the Act;

(2) the restriction and reduction of workers compensation benefits under the Act; and

(3) the subjugation of occupational disease compensation under the Act to the totally inadequate occupational disease provisions of state law.

Enactment of S. 1182 would not only cause undue economic hardship for currently covered workers, but would also increase job safety and health hazards and further retard the development of adequate and equitable workers' compensation programs at both the state and federal levels.

Coverage

S. 1182 would dramatically restrict coverage under the Act, particularly for workers engaged in shipbuilding, ship repair and ship breaking. Indeed, it would return to the jurisdictional situation which existed prior to the Act's 1972 amendments.

As this Committee is well aware, prior to the 1972 amendments, coverage under the Act depended upon where a worker was working at the time of injury. If he were working over the water, he was covered by the Act, but if he were working on land, he was, for the most part, subject to whatever state workers compensation law that applied. Thus, coverage under the Act did not depend upon the nature of the work being performed, the hazards confronted, or the responsible employer, but, in the words of this Committee's 1972 report, ". . . the fortuitous circumstance of whether the injury occurred on land or over water . . . ." Indeed, as Supreme Court Justice William O. Douglas remarked, coverage often depended upon "where the body falls."

The pre-1972 coverage situation was patently ridiculous, and the Congress, with little or no objection from the industries involved, properly amended the Act to provide a more reasonable definition of coverage. Thus, the 1972 amendments provided that:

> Compensation shall be payable under this Act in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel.

Mr. Chairman, it should be emphasized that the 1972 amendments in no way extended coverage to workers engaged in activities unrelated to longshoring, harbor work, shipbuilding, ship repair or ship breaking. Indeed, contrary to the impression given by certain employer groups that unrelated work is subject to LHWC coverage, this Committee's 1972 report specifically stated that such was not the intent. According to the report, "the Committee does not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity." The courts have consistently upheld this congressional intent.

Thus, Mr. Chairman, the 1972 amendments extended coverage beyond the artificial and arbitrary "water's edge" to include all workers engaged in longshoring, shipbuilding, ship repair, and related activities. With regard to shipbuilding and ship repair, the courts have consistently ruled that only those workers who are directly and integrally involved in shipbuilding and ship repair are covered by the Act. Given the inequitable situation which existed prior to 1972, we believe that this is sound public policy.

S. 1182, on the other hand, would return to the pre-1972 era, and would be particularly harmful to workers employed in the shipbuilding industry. The bill would restrict coverage only to ship builders, ship repairmen, and ship breakers " . . . while such person(s) is upon the navigable waters of the United States or floating drydock." It would exclude from coverage

those working on piers, wharves, building ways, marine railways, graving docks, shops, ". . . or any other facilities or areas over land customarily used in ship repairing, shipbuilding, or ship breaking."

Moreover, for those USWA members engaged in longshoring activities, as well as longshoremen in general, the bill resurrects the so-called "point of rest" doctrine thereby limiting land-based coverage to the first point at which cargo is loaded.

We reject this notion that workers engaged in the same or similar work over water should be treated differently than those on land. They are working for the same employer, doing the same or similar work, exposed to the same or similar hazards and have the same or similar needs when injured or killed. If they are building a ship, then it should make no difference as to whether they are building it on land or over the water. The hazards are the same, the employers are the same, the safety programs are the same, and the compensation system should be the same.

Moreover, even for longshoremen it has long been recognized that certain land-based work should be covered under the Act. Even S. 1182 recognizes this fact by permitting longshoremen's coverage to "the point of rest." While we concur with our colleagues in the longshore unions that the "point of rest" doctrine is far too limited and an unwarranted return to the pre-1972 longshore situation, the point is that even under the "point of rest" principle, certain land-based work remains covered. To accept even that very limited principle is, we submit, to accept the broader principle that all work directly related to and an integral part of longshoring, shipbuilding, ship repairing, ship breaking, and related activities should enjoy coverage under the Act. To do otherwise would be to accept coverage for "point of rest," land-based longshoremen to the exclusion of all other land-based workers currently covered by the Act.

Moreover, the shipbuilding industry has a closer association with the federal government than most other industrial operations. Its reliance upon federal procurement is a fact of the marketplace. Additionally, shipbuilding is largely supported by federal subsidies, the existence of which is a realistic government recognition of the type of mixed market that prevails. It is, therefore, not at all out of character that there be a federal approach to workers' compensation. The precedence for such federal involvement has long since been established and is quite legitimate.

It is not inconsistent, therefore, for federal OSHA to prevail on both land and water operations for those workers covered by the Longshoremen's and Harbor Workers' Compensation Act. The withdrawal of these workers from uniform coverage under the Act would constitute an inconsistency in dealing with the peculiar characteristics of the shipbuilding industry and its historical relationship to the federal government.

Yet still another point to be made is that the real reason for the withdrawal of many shipbuilding workers from coverage, thereby transferring them to coverage under state workers' compensation programs, is that the state systems provide less compensation protection. If the state systems were indeed adequate, then the debate over jurisdictional consistency would be more academic than practical. However, since there is a legitimate rationale for shipyard workers to be covered by the federal compensation program, it is surely inequitable to transfer their compensation claims to the state systems which the Congress has thus far decided not to reform.

Frankly, the jurisdictional question raised by the Nickles bill is primarily one of economics. Our union certainly asserts that the principles which prevail in the LHWC Act should be made applicable to all state programs. I believe that this Congress will reaffirm these principles during its current deliberations on the LHWC Act. It is the final benefit schedule of the present congressional review which should not be denied shipyard workers simply because those benefits may be more realistic than those provided workers under the state compensation systems. Basically, we feel that this is the only reason for the proposed transfer of coverage and it is a political decision which we hope this Committee will not make.

Mr. Chairman, the 1972 amendments brought uniformity and equity to coverage under the Longshoremen's and Harbor Workers' Compensation Act. The Supreme Court has unanimously upheld this expansion of coverage, and workers have enjoyed a measure of protection as a result. To now suggest that coverage be denied to many thousands of currently covered workers is, we believe, both unfair and punitive.

Benefits

In addition to expanding coverage, the 1972 amendments made substantial improvements in the Act's benefit structure. Most of these benefit improvements were in line with the recommendations of the National Commission on State Workmen's Compensation Laws. Of particular importance were:

(1) increasing the weekly wage replacement benefit from a maximum of $70 per week to 66 2/3 of a worker's average weekly wage subject to a maximum of 200 percent of the national average weekly wage in nonfarm employment;

(2) providing for annual benefit adjustments equal to the percentage increase in the national average weekly wage;

(3) improving death benefits for the survivors of deceased workers;

(4) providing claimants the right to choose their own physicians.

For the most part, we believe that the improved benefits were, and continue to be, necessary to meet the modern needs of workers injured or killed on the job. Indeed, the 1972 amendments transformed the Longshoremen's and Harbor Workers' Compensation Act into the most modern workers' compensation law in the nation and provided a model for existing state programs and possibly a national workers' compensation law.

The amendments proposed by S. 1182, on the other hand, would seriously compromise the benefit improvements made by the 1972 amendments. Of particular importance are those provisions that would:

(1) replace the current weekly wage replacement benefit formula with one based upon 80 percent of "spendable earnings," defined as average weekly pay minus federal and state taxes;

(2) limit annual benefit adjustments to 3 percent a year;

(3) offset LHWC benefits with payments received from Social Security (retirement, survivors, and disability), unemployment compensation, other workers' compensation benefits and employee pension plans; and

(4) limit the freedom of choice of physicians.

The first thing to note about the proposed benefit changes is that they are designed not to improve the benefit structure but rather to provide an overall reduction of existing LHWC benefits. In this respect, the proposed changes are solely for the benefit of employers and insurance companies at the expense of workers.

In terms of the specifics, we believe that most of the proposed changes have severe shortcomings.

(1) The proposal to replace the existing weekly wage replacement benefit with 80 percent of "spendable earnings" (defined as average weekly pay minus federal and state taxes) is inequitable and probably would result in lower overall benefits. The proposed formula is inequitable because federal and state tax rates vary according to family status, size, and state residency.

(2) The proposal to "cap" annual benefit adjustments at 3 percent simply ignores the inflationary impact of our economy. Long-term disabled workers are largely confronted with the same costs of living as the rest of us, and to impose upon them a measly 3 percent annual benefit adjustment is not only arbitrary but punitive.

(3) The same can be said for S. 1182's proposal to offset LHWC benefits against other benefits that a worker might receive, particularly Social Security and pension retirement benefits. Workers paid for these out of their own pockets in the form of taxes and deferred wages and to suggest that they now subsidize employer's workers' compensation obligations is unacceptable.

(4) Finally, S. 1182's provision to deny workers the free choice of doctors, and subject them to a list of employer nominated physicians, is a return to the dark ages and contrary to the recommendations of the National Commission on State Workmen's Compensation Laws. Indeed, this proposal is an invitation to employer abuse. It should be noted that the 1972 amendments, while providing for the free choice of physicians, also contained safeguards to the extent that an employer may request and receive a second medical examination of a worker by a physician of the employer's choice. If there is disagreement between the worker's

doctor and the employer's doctor, the Secretary of Labor appoints a third physician to resolve the dispute.

Safety and Health

Mr. Chairman, longshoring and shipbuilding continue to be among the most hazardous occupations. In terms of shipbuilding, OSHA inspections have uncovered large scale hazardous situations and have assessed some of the largest penalties in the Agency's history for serious safety and health violations.

It has long been recognized that in addition to providing adequate income maintenance benefits, medical care, and rehabilitation services on a "no-fault" basis, one of the most fundamental principles of workers' compensation is to provide an economic incentive to employers to provide safe and healthful workplaces. In this respect, our union would be pleased indeed if safety and health in the workplace was such that employers would not have to spend a dime for workers' compensation. Unfortunately, such is not the case because workers continue to be injured, diseased and killed on the job.

We believe, however, that the workplace can be made safer and healthier. Indeed, the combination of effective regulatory efforts through OSHA and an adequate workers' compensation system can go far in reducing workplace injury, disease and death. If permitted to carry out its statutory mandate, OSHA would have a profound impact on worker safety and health; and an effective workers' compensation, in addition to meeting the needs of injured workers, would provide the necessary economic incentive for employers to improve their safety and health efforts.

Since the LHWC Act is a model workers' compensation law, which largely conforms to the recommendations of the National Commission on State Workmen's Compensation Laws, we believe that it can make an important contribution to furthering the safety incentive, as well as providing adequate compensation benefits.

To now suggest, however, that the LHWC Act be cut back and weakened (as proposed by S. 1182) is to severely compromise the safety incentive principle. Without the full force of the Act, as presently constituted, employers in these industries will have less economic incentive to improve their safety and health efforts. The result, we fear, will be a tragic increase in occupational injury, disease and death. For this reason alone, we appeal to this Committee not to proceed with S. 1182.

Occupational Disease

As outlined in the preceding pages of this testimony, there are a lot of things wrong with S. 1182. Indeed, the bill has as its sole purpose to relieve employers of much of their responsibilities under the LHWC Act. While we strongly object to the provisions restricting coverage, reducing benefits, and weakening the safety incentive of the Act, we are particularly incensed over the bill's provision to subject occupationally diseased workers to the archaic and punitive occupational disease provisions of applicable state workers' compensation laws.

S. 1182 proposes to amend section 8 of the LHWC Act by adding a new subsection (j) which states:

> Entitlement to compensation for disease alleged to be derived in any part from the claimant's occupation shall be determined by application of the substantive workers' compensation law of the state in which the last exposure to the disease-producing or aggravating stimulus occurred.

If adopted, this provision would have the net effect of denying nearly all occupational disease claims made by workers covered by the LHWC Act. Indeed, it would subject the whole question of compensable occupational diseases to the applicable state laws.

Mr. Chairman, if there is one single major deficiency in the state workers' compensation system it is the universal failure to compensate for occupational disease. According to a recent Labor Department study, some 95 percent of all occupational disease cases go uncompensated under existing state laws. There are many reasons for this, few having to do with questions of medicine or science and most directly attributable to business economics and politics.

It has long been accepted by the Occupational health community that some 100,000 workers die annually from occupationally-related diseases, and another 400,000 contact an occupational disease each year. In addition to failing to provide even a measure of social and economic justice to these workers and their families, the existing state compensation systems have forced diseased workers to subsidize their employers to the tune of $11.5 billion a year in lost wages that go uncompensated. This is a true American tragedy which no other industrial country has permitted. It is a direct insult to American workers, and a social condemnation of both government and the business community.

Mr. Chairman, this whole question of occupational disease has been debated in the scientific and medical communities for a number of years. While it has been the subject of extensive study and some congressional hearings, a public policy decision has yet to be made. Given the controversy which surrounds the occupational disease issue, we believe that it is irresponsible for this Committee to take the kind of action proposed in S. 1182 without a full and public discussion of the occupational disease question and the gross inadequacies of state law. Indeed, to almost causally subject the even limited occupational disease protection afforded by the LHWC Act to the totally inadequate state system is, we submit unconscionable.

On a related matter, S. 1182 would severely restrict a workers' ability to receive compensation for occupationally-related hearing loss. Indeed, Section 6(b)(2) of the bill would turn the clock back more than 20 years by adopting a method for determining hearing loss which has long since been revised.

In addition to a number of other shortcomings -- including a compensation penalty based upon age -- this provision would adopt a formula for determining hearing loss that would make it much more difficult, if not impossible, for most occupationally-related hearing impairments to be compensated under the LHWC Act. Without going into all the technical details, suffice it to say that the proposed formula is one developed in 1959 by the American Academy of Ophthamology and Otolarynuology (AAOO), which the Academy itself has long since revised. Moreover, even the relatively newer AAOO formula has been determined to be insufficient by a large segment of the medical community and is more restrictive than the formula recommended by the Labor Department's

Office of Workers' Compensation Programs and incorporated in OSHA's hearing conservative standard.

It appears that the only rationale for S. 1182's inclusion of the 1-59 formula is that many states have adopted it and, as in the case of other workers' compensation issues, have thus far not brought their programs up-to-date with modern medical science. This is just another example, therefore, of the tendency of S. 1182 to reflect the inadequacies and inequalities of existing state law.

As in the case of occupational disease, we believe that before this Committee takes any legislative action on S. 1182, that a full and thorough analysis be undertaken of the scientific and medical aspects of the hearing loss issue.

State Workers' Compensation Programs

As stated earlier, we believe that the only purpose of S. 1182 is to benefit LWHC employers by lowering their compensation costs. By drastically reducing coverage, it forces many currently covered workers back under applicable state workers' compensation laws. By reducing benefits for those who would remain covered under S. 1182, it seeks to lower the overall benefit structure to the common denominator of the state systems. By transferring responsibility for occupational disease compensation to the states, it effectively denies compensation for such diseases. Thus, rather than serving as a model for state workers' compensation systems -- as the current law does -- S. 1182 seeks to compound the inadequacies of existing state programs.

Mr. Chairman, if existing state workers' compensation programs were adequate to meet the needs of injured workers and fulfilled the safety incentive, then the debate would center over which system -- state or LHWC -- best suited the needs of both workers and employers. However, as we all know, the state workers' compensation programs and laws are woefully deficient. Indeed, every competent authority to examine the state system has agreed with the 1972 report of the National Commission on State Workmens' Compensation Laws which concluded that state workers' compensation programs are "inadequate and inequitable." While some improvements in some state laws have been achieved since 1972, none have yet realized all of the Commission's "19 essential recommendations." Indeed, some states have regressed.

Our union, along with organized labor as a whole, believes that the time has long since passed for congressional action on workers' compensation reform. We believe that Congress should enact federal legislation setting national minimum workers' compensation standards governing all states. Only through such legislation will we be able to achieve the kind of workers' compensation system which adequately meets the needs of injured workers while at the same time providing an effective safety and health incentive for employers.

S. 1182 represents a step backwards from this goal. By restricting coverage and reducing benefits it would serve to re-enforce and compound the prevailing state workers' compensation system with all of its inadequacies and inequities. Indeed, it would provide a powerful signal to the states that they are at liberty to further regress. Rather than contributing to our common goal of less workplace injury, disease and death, S. 1182 may result in increasing workplace hazards.

For all these reasons, we urge this Committee not to proceed with legislative action on S. 1182.

-oo0oo-

SUMMARY

STATEMENT BY
JOHN J. SHEEHAN, LEGISLATIVE DIRECTOR
UNITED STEELWORKERS OF AMERICA

before the
SENATE LABOR SUBCOMMITTEE

on the
LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT
(S. 1182)

JUNE 17, 1981

Mr. Chairman, members of the Senate Labor Subcommittee, my name is John J. Sheehan and I am the Legislative Director of the United Steelworkers of America.

With me today are Jack Hower and Carl Hall, representing our Local Union 8888, in Newport News, Virginia. Mr. Hower is a staff representative and Mr. Hall is the chairman of the local's workers' compensation committee.

Local Union 8888 represents some 15,000 shipyard workers at the Tenneco shipyards in Newport News, all of whom are covered by the Longshoremen's and Harbor Workers' Compensation Act. In addition, our union represents some 2,000 other workers covered by the Act.

At the outset, let me state that we are opposed to the amendments proposed by S. 1182, the most damaging features of which include:

(1) the elimination of coverage for many workers currently covered under the Act;

(2) the restriction and reduction of benefits; and

(3) the subjugation of occupational disease compensation to the totally inadequate provisions of state law.

Enactment of S. 1182 would not only cause undue economic hardship for workers, but would also increase job safety and health hazards and further retard the development of adequate and equitable workers' compensation programs at both the state and federal levels.

Coverage

With respect to the coverage issue, we would like to make the following points.

(1) S. 1182 would be particularly harmful to workers in the shipbuilding industry by eliminating coverage for those working over the water.

(2) This return to the pre-1972 situation would establish coverage on the arbitrary basis of where a worker was working rather than the nature of the work, the hazards confronted, or the responsible employer.

(3) We reject this notion that shipyard workers engaged in the same or similar work over water should be treated differently than those on land. The hazards are the same, the employers are the same, the safety programs are the same, and the compensation system should be the same.

(4) There are long standing precedents for covering land-based workers under the Act which even S. 1182's restrictive "point of rest" principle for longshoring recognizes.

(5) Due to its dependence on federal procurement and federal subsidies, the shipbuilding industry has a closer association with the federal government than most other industrial operations. It is, therefore, not inconsistent that there also be a federal approach to workers' compensation.

(6) It appears that the real reason for the proposed withdrawal of coverage is to subject many shipyard workers to state workers' compensation systems which provide less protection. If the state systems were indeed adequate, then the jurisdictional question would be more academic than practical.

(7) The 1972 amendments brought uniformity and equity to coverage under the Act, and workers have enjoyed a measure of protection as a result. To now suggest that coverage be denied to thousands of currently covered workers is both unfair and punitive.

Benefits

With respect to the reduction and restriction of benefits proposed by S. 1182, we would like to make the following points.

(1) S. 1182 would seriously compromise the benefit improvements made by the 1972 amendments.

(2) The proposal to replace the existing wage replacement benefit with 80 percent of "spendable earnings -- defined as average weekly pay minus federal and state taxes -- is inequitable and would result in lower benefits for workers who pay more than 10 percent of their gross wages in state and federal taxes.

(3) The proposal to "cap" annual benefit adjustments for permanent total disability at 3 percent ignores the inflationary impact of our economy on costs of living.

(4) The proposal to offset LHWC benefits against other benefits that a worker might recieve, particularly retirement benefits, does not take into consideration the specific purposes of those benefits. The offset formula has no rationale and mitigates against the reason for the compensation benefits in the first place; namely, an award for injury caused.

(5) The proposal to deny workers the free choice of physicians, and subject them to a list of employer nominated doctors, is an invitation to employer abuse and contrary to the recommendations of the National Commission on State Workmen's Compensation Laws.

Occupational Disease

In terms of S. 1182's proposal to subject occupational disease compensation to applicable state laws, we would like to make the following points.

(1) The single greatest deficiency of state programs is their failure to adequately compensate for occupational disease.

(2) Some 95 percent of all occupational disease cases go uncompensated by the state systems.

(3) The net effect of S. 1182's occupational disease provision would be to deny compensation for occupational disease to most LHWC workers.

(4) Given the controversy which surrounds the occupational disease issue, we believe that it is irresponsible

for this Committee to take the kind of action proposed by S. 1182 without a full investigation of the occupational disease question and the gross inadequacies of state law.

(5) In terms of compensation for occupationally-related hearing loss, S. 1182 would turn the clock back 20 years by adopting an antiquated method for determining hearing loss that has long since been revised by the medical community.

Safety and Health

With respect to the relationship between workers' compensation and safety and health, we would like to make the following points.

(1) Shipbuilding and ship repair are among the most hazardous industries (see appended chart on injury and illness incident rates).

(2) In addition to providing adequate benefits, one of the most fundamental principles of workers' compensation is to provide an economic incentive to employers to provide safe and healthful workplaces.

(3) By weakening the LHWC Act, S. 1182 will severely compromise the safety incentive principle for a very dangerous industry.

Presumptions

With respect to S. 1182's proposal to repeal the presumptions contained in Section 20 of the Act, we would like to make the following points:

(1) the presumptions have been in the Act since its inception and there is little evidence that they have been abused or have caused undue hardship on employers;

(2) the presumptions, including the presumption of compensability, are rebuttable and do not constitute evidence;

(3) the presumptions become invalid when an employer offers substantial evidence to the contrary;

(4) the repeal of the presumptions, particularly the presumption of compensability, would shift the entire burden of proof on the worker rather than the employer where it has historically been placed;

(5) the repeal of the presumptions would undermine the purpose of the Act by making it more difficult, if not impossible, for many workers to receive legitimate workers' compensation awards;

(6) the presumptions have long standing statutory and judicial acceptance, as well as humanitarian justification, and their removal, in the words of Judge Samuel Smith, "may work tremendous injustice."

Conclusion

(1) We believe that the sole purpose of S. 1182 is to benefit employers by reducing their compensation costs.

(2) By reducing coverage, the bill forces many workers back under applicable state workers' compensation laws.

(3) By reducing benefits, it seeks to lower the overall benefit structure to the common denomination of the state systems.

(4) By subjecting occupational disease compensation to state law, it effectively denies compensation for such disease.

(5) By weakening the overall structure of the Act, it seriously compromises the safety incentive, and further retards the development of adequate workers' compensation programs at both the state and federal levels.

For all these reasons, we urge this Committee not to proceed with legislative action on S. 1182.

-ooOoo-

Injury and Illness Incident Rates - 1978-1979

(Per 100 Full Time Workers)

	Total Cases		Lost Workday Cases	
	1978	1979	1978	1979
Shipbuilding & Repair	20.8	24.1	11.0	12.9
Primary Metals	17.0	17.3	7.5	8.1
Fabricated Structural Metal Products	22.5	23.6	9.3	10.4
Construction (non-residential building)	19.2	19.7	6.6	7.5
Mining	11.5	11.4	6.4	6.8
General Manufacturing	13.2	13.3	5.6	5.9
Total Private Sector (excluding farm employment)	9.4	9.5	4.1	4.3

SOURCE: U. S. Department of Labor
Bureau of Labor Statistics
Bulletin No. 2097

Mr. **Nickles**. Thank you, Mr. Sheehan. We appreciate your appearing before us again.

A couple of comments. The whole question whether or not a person should be under Federal or State, or whether or not we should have Federal mandates to the States are questions that have been before this committee for some time, with pressures from different groups. It is not my intention to try to resolve that with this piece of legislation. I recognize where you are coming from, and that, I guess, has a lot to do with—and I appreciate, too, Mr. Sheehan, your comment. It is economic—in most cases, the State workers' compensation plans have benefits far less than the longshore plan. It is very obvious, because of the rates and the benefits.

Could we possibly make some agreements? I used to work in a plant that was covered by the Steelworkers, so I am fairly familiar with that group. But if I were an employer, and if I had to pay $50 or $60 in workers' compensation premiums, that would be money I could not pay in benefits—it would not necessarily all go to benefits. I can see this being really indirectly very punitive to the working person, particularly the working person who is not looking to abuse the system, but the guy who is probably like the majority of members, who is going to work and not really be looking to make a buck out of a system that is open for abuse, but just wanting to make an honest, decent living for his family. I can see this working to his disadvantage. If an employer has to, for every $100 in salary, pay $60 in workers' compensation it is actually being punitive to the worker. Maybe the employer cannot be competitive, and so he has to funnel so much of his resources into compensation, and there is less for real compensation.

Mr. **Sheehan**. I would like to make two comments, and my brothers would probably like to make some others.

One, punitive in relation to what? I feel that the criticism of the benefit level in the Longshoremen's Act is really unjustified because a number of years ago, the National Commission on Workmen's Compensation did in fact recognize that the compensation levels of the States were very inadequate. They came out with a report. President Nixon himself endorsed that report, which was released during his term of office. That report did recommend that the adequate level of compensation ought to be two-thirds of pay.

What we find in the Longshoremen's Act is an adoption of that very recommendation, which even Nixon himself had endorsed. He endorsed it, however, by saying that the States ought to adopt it. I do not want to mislead you on that. But the principle of the adequacy of the level was not contested. Here, I am afraid the inference that this bill has given is that you are questioning the legitimacy of the level of the benefit by saying well, if the Federal is giving two-thirds, and the States are giving something far inferior, then maybe the Federal Government is giving too much. All I can tell you is that that issue went through a panel and a recommendation many years ago. Even President Ford himself did not question the adequacy of that level.

The second comment that I would like to make refers to the inference that a worker would rather have a job, and get higher pay, despite the risk of being injured, and being thrown on a faulty and inadequate compensation system. "Don't you think you owe that to your family?" That, Mr. Chairman, is a very bad bind, unfortunately, we found ourselves in.

I would say that any worker in this country would say, "If the compensation system, with the adequate levels of benefits, can be, if you wish, a free market incentive to provide better safety in these workplaces, I am willing to pay for that even if it means less wages, because there is no sense in my going around with a maimed arm or an infected lung."

And you ought to look at the end of our summary statement, which has the injury and illness incident rate in the shipbuilding industry which is certainly among the highest of the categories. So we are looking for some kind of an impact of this bill on that.

Senator NICKLES. Let me ask a question, and you can state what you want to, but we are going to have to go quickly.

Should an employee be allowed to make more money as disabled, more take-home pay, actual pay taken home, than he would as an actual employee? And, is it more dangerous to work on the docks today than it was in 1972?

Mr. HARMON. Senator, I have been hearing for the last 2 days about abuse——

Senator NICKLES. Answer my question, and then you can state your comments.

Mr. HARMON. Is it fair?

Senator NICKLES. No. Should an employee make more money being disabled than he should as an employee? We have had statements that many employees make more money disabled than they did otherwise. Is that right?

Mr. HARMON. I do not know if any of my workers have received more money, to begin with.

Senator NICKLES. Well, should we have a system that does not allow that? That is my question.

Mr. HARMON. A worker should be compensated for his injuries.

Senator NICKLES. But not making more than what he was making before the injury?

Mr. HARMON. I do not know any that are receiving more, and I would have to look at that to answer it. My people do not make more.

Senator NICKLES. If you add in social security disability and maybe State workers' compensation, and you add all those little things together, they may be receiving more.

Mr. HARMON. I heard that statement today, and I find that hard to believe, and I would like to see facts where anybody is receiving State comp and Federal comp. I do not want to call the gentleman a liar, but I think he is a lot of stuff. None of my workers that I represent are receiving it.

Senator NICKLES. OK. Make your comments, and then we will ask Senator Williams for questions.

Mr. HARMON. I have been hearing about abuses, and I find it hard to believe that you can say that a worker who loses an arm or loses a hand or loses a leg is abusing the system. I think the abuse is by the employer who fails to make the jobsite safe enough that an employee can know he can come to work and leave at 4 o'clock when the shift is over. I think that is what you should be addressing yourself to, to make the job safe.

Are you saying, this committee, or are the employers saying that the abuses are by the employees getting hurt? I know of no abuses. My members who get hurt are entitled to file workmen's compensation, and that is what they are doing.

Where are the abuses at? Show us some statistics. You say that the claims are shooting up by 100 percent or 200 percent or what-have-you—show us where they are not entitled to be paid compensation.

Senator NICKLES. Thank you.

Senator Williams, do you have any comments?

Mr. SHEEHAN. Senator Nickles, can Mr. Hall make a statement on that, with reference to Tenneco employees?

Senator NICKLES. Go ahead.

Mr. HALL. I do not believe the workers at Tenneco are receiving more on compensation than they do when they work.

Senator NICKLES. In the first place, tell us what the workers make at Tenneco, so we will have an idea of what we are talking about.

Mr. HALL. I believe the existing top rate right now in the shipyard would be $9.16.

Senator NICKLES. That is the top rate, the maximum rate?

Mr. HALL. That would be as of August 1.

Senator NICKLES. Nobody makes more than $9 an hour working for Tenneco?

Mr. HALL. Not under the production scale.

Senator NICKLES. Is that injury level, or is that maximum? I was just wondering. Is that the injury level—if you are hired, do you make $9, with no experience?

Mr. HALL. No. That is the topped-out rate.

Senator NICKLES. OK.

Mr. HALL. I think to clear up one point as far as State and Federal compensation, it has been mentioned earlier that people were receiving benefits under both. Many times, in jurisdiction cases, what happens is a claim is initially awarded under State, and then a claim is later found to fall under Federal jurisdiction, so a claim is entered, and the difference between the State compensation and the Federal compensation is awarded at the outcome of that claim. There is no ballooning in the sense that he is receiving double jeopardy here or double payments. It is merely the difference between one compensation rate under State and Federal.

Senator NICKLES. Do you agree that there should not be any pyramiding; in other words, they should be coordinated to provide that benefit?

Mr. HALL. Yes.

Senator NICKLES. I appreciate that.

Mr. HALL. In addition, the State program altogether, the schedules that State compensation has for specific injuries, say, to a hand or an arm or a leg, in terms of weeks, are quite reduced from that of the Federal program. And in the shipbuilding industry today, we have people who are moving from one job location to another. This day, a welder may be working on a ship; the next day, he may be working on the pier, and the employer uses that flexibility, of course, to maintain production, and it is to his advantage.

Under this existing bill, if indeed the workers who were just on land-based operations were separated, the question of jurisdiction here is going to be really confusing because so many injuries are cumulative in nature, such as back injuries, knee injuries, and hearing loss in noise areas. The confusion is going to be extremely more complex if this bill is introduced than it is at present, where we have a definition of a shipbuilder, shipbreaker, and ship repair.

Senator NICKLES. I believe in our legislation, we define all of those terms—shipbuilder, repair, et cetera—we define it on the waterfront.

Mr. HALL. Yes, but you are excluding them.

Senator NICKLES. We exclude the work that is done.

Mr. SHEEHAN. I think the point we are making here is that for instance, under your bill, with regard to shipbuilders, you exclude those who work on land, but include those who work on water.

Senator NICKLES. Correct.

Mr. SHEEHAN. Now, at Tenneco, a worker may be on land and on water, going back and forth. This is the old issue we had in 1972. But now, if such a worker has some accident records, and he is a land-based worker, the chances are Tenneco might restrict him from moving into a job on water, even though it is just a few yards away, because if he has an accident on water, the benefit rates are much higher.

So you are going to find a skewing of the seniority system and the ability to do work because they will be restricted and kept in certain areas of the workplace. I think that is the comment Mr. Hill is making.

Mr. PERRY. Senator, on the same subject, I do want to add that our major employer right now, Todd Shipyards, Los Angeles division, has a plan whereby they are going to have attached to their drydocks, like railroad tracks, and those tracks will be connected to other railroad tracks when the drydock comes up out of the water. So we are going to be working on ships that are going to be taken out of the water and rolled off onto the land on railroad tracks. We are going to have the same ship, with the same hazards and the same dangers if the ship had been in the water, but under this legislation, we will not be covered under the act.

Senator NICKLES. Thank you.

Senator Williams?

Mr. HOWER. And I might add to that——

Senator NICKLES. Wait a minute. We are going to have to move on. We have actually two panelists, and I realize that you have invited other people, and that is fine. But gentlemen, we have nine more people to testify, and we are in session and have votes. I do not mind other people making comments; I solicit it. But timewise, we are running way behind. We will have to let Senator Williams ask his questions, and if you can make your points, please do.

Senator WILLIAMS. As you describe all this, I will tell you, there is one profession that is going to be the beneficiary if they like to work, and that is the compensation lawyers. It would seem to me that in its confusion, it would be the lawyers who would be fully occupied, fully employed, unscrambling and trying to find out which laws cover.

Now, the shipbuilders, the people that you represent—you mentioned the welder. His job site goes where the welding must be done, and I can imagine that it is on the dock, maybe a little removed from the dock, but it is all directed to the ship, and what he is welding is transferred to the ship. He can be, I would think within an hour, first under State comp, then under longshoremen comp. He has a back injury that is aggravated, and I can just see that lawsuit now. Was it aggravated at 10:20 when he was on the dock, or at 10:40 when he was on the ship?

It would seem to me that part of the confusion that we tried to overcome with the 1972 amendments is resurrected, and we are back in "fat city" for compensation lawyers, on both sides.

On Virginia compensation law, how do the weekly wage replacement benefits of the act compare to what workers receive under the State of Virginia workers' compensation program?

Mr. **Hower**. Senator, the Longshoremen and Harbor Workers' Act provides 66⅔ percent of a worker's average earnings over a period of a year. And, taking an employee who is at our $9.16 rate, times 40 hours, he would come out with a $366.40 weekly wage. Now, 66⅔ of that would be $244.12 per week. Under Virginia's law, the maximum that this employee could get would be $213, or approximately $31.12 per week less than he would under the Federal.

It goes beyond that, though, that should an employee receive permanent impairment of his body or lose a limb or a finger or anything, the compensation payment is quite different under Federal versus the State. Under the Federal, if an employee in the shipyard right now were to lose his hand, say, he would receive 244 weeks of compensation benefits. Under the State, he would only receive 156 weeks. For the loss of an arm, under Federal, he would receive 312 weeks; under the Virginia law, he would only receive 200 weeks.

So as you can see, there is a drastic difference between the State law and the Federal law. And we do not feel at this time that the Virginia law can adequately pay these workers to sustain themselves while they have received an injury in the shipyard.

Senator **Williams**. And yet, these are the same workers who can be in and out both jurisdictions within a workday.

Mr. **Hower**. Yes, sir.

Senator **Williams**. I have other questions, Mr. Chairman, and I wonder if I could submit them for written response.

Senator **Nickles**. I would appreciate that, Senator Williams, in view of the time, and likewise, I do, too. And this goes for all of our panelists. I think there will be quite a few questions because of the in-depth nature of this legislation.

I will be asking you questions concerning the specific definitions—and I would like to finish with that. I would like very much for you to not just say, "No, I do not like that." I would like for you to come back and say, "No, I think it should be defined like this." We have a Supreme Court case that says we should define maritime employment, longshoreman, longshoring operations, and other things, if we do not do anything else. So we have a long way to go, and instead of just saying this is a terrible thing, we need to do something. So I would appreciate your input on that, and we will submit those questions, and I would very much appreciate everyone's quick response, if possible, because I would hope that, with some success, we might be able to go into markup before the August recess.

Mr. **Harmon**. Senator, before you try to define it—I realize all the Senators are pretty busy—but if you could send someone from your staff into a couple shipyards and look at the jurisdiction——

Senator **Nickles**. We have done that, and I have also made the commitment that I would personally try to do that.

Mr. **Harmon**. Well, I did it in 1979. I took a couple of Representatives in and showed them our yard—as a matter of fact, I canceled my vacation to do it. And they were quite impressed with the fact now that we are building almost the entire ship on the ground, off the water, and then putting the assembly together on the water. And I would like very much, if any members of the committee have any questions, that they come into the yard. We have a shipyard 40 miles from here, at Sparrows Point, and we would be more than willing to take anyone from the staff in and show them.

Senator **Nickles**. I appreciate that. Thank you, gentlemen.

Mr. **Sheehan**. Could I indicate that we would like to take you up on that offer of working with your staff on some of the definitions if that offer does indicate that it is not for the purpose of excluding whole categories.

Senator **Nickles**. We would very much like to work with you.

Mr. **Hall**. Mr. Chairman, could I just very briefly comment on something that has not been covered yet in all the discussion I have heard today, and that is the repeal of section 20, which is the presumption clause that the employee was injured on the job.

Senator **Nickles**. Would you please do that in writing for me?

Mr. **Hall**. Yes, sir.

Senator **Nickles**. We do have nine more panelists, and I apologize for the fact that we had to run you through in a quicker method than we would like to.

We have four gentlemen in our next panel. Edwin Hood, president of the Shipbuilders' Council of America; Bill Welch, chairman of the Shipbuilders' Council Workers' Compensation Committee; Stephen Clarkson, from Washington, D.C.; Stewart Niles from New Orleans, and J. C. McElveen from Washington, D.C.

Please proceed.

STATEMENT OF EDWIN M. HOOD, PRESIDENT, SHIPBUILDERS' COUNCIL OF AMERICA, ACCOMPANIED BY BILL WELCH, CHAIRMAN, WORKERS' COMPENSATION COMMITTEE; STEPHEN B. CLARKSON, STEWART E. NILES, JR., AND JUNIUS C. McELVEEN, JR., SPECIAL COUNSEL

Mr. **Hood**. Mr. Chairman, I am privileged to be accompanied by experts today, so I will make my introductory remarks very brief.

Senator **Nickles**. We would like silence so we can hear our witness. Thank you.

And I do appreciate your using the word, "brief".

Mr. **Hood**. The membership of the Shipbuilders' Council of America is composed of shipbuilders, ship repairers, and component manufacturers in all sections of the country. Collectively, they constitute about 90 percent of the Nation's shipbuilding industrial mobilization base.

The thrust of our testimony will be that U.S. shipyards have been gravely encumbered by the consequences of the 1972 amendments to the Longshore Act.

The record of the past decade has dramatically demonstrated to us that the act is administratively burdensome and uninsurable, and most significantly, it has invoked an abusive, excessively expensive proclaimant bias.

By virtue of the 1972 amendments and subsequent judicial interpretations, the Lonqshore Act has now been extended to some 150,000 shipyard workers. We have the largest single industry group in the country covered by this act.

A greater number of these employees work in controlled industrial areas, shops and offices, as opposed to hull erection, shipfitting and ship repairing over the water. It remains our firm conviction that only the latter category of workers should be maritime employees subject to the act, and the historic water's edge jurisdictions of the act should be restored.

A 1978 study of Longshore Act experiences within the U.S. shipyard industry predicted that 1980 workers' compensation costs would be $1,122 per employee, or an increase of 851 percent over 1970. One of our yards reports a somewhat lesser cost of $603 per employee, but this represented an increase over 1970 of 2,868 percent.

These tremendous increases are obviously causing great difficulty not only for major shipbuilders, but for many smaller shipyards.

The manifestation of all of this is in higher costs for the construction of ships in the United States. Our shipbuilders are inhibited from competing on the world market. Costs of urgently needed vessels for the U.S. Navy are greater, putting heavier demands upon the public treasury. To paraphrase a popular theme: more dollars are buying less defense.

Our plea for remedial legislation such as S. 1182 which you have sponsored, Mr. Chairman, along with Senator Nunn, is therefore more than subjective. We commend you both as well as this subcommittee for your timely consideration of a pervasive phenomenon which has gotten out of hand and which merits immediate correction. In point of fact, correction is long overdue.

From here, Mr. Chairman, with your permission, Mr. Clarkson will present data relative to cost experience under the act by a major shipbuilder. Then Mr. Niles, an acknowledged expert on the act, will deal with specific sections of the act which make it uninsurable. Finally, Mr. McElveen, who has litigated more than 800 cases under the act, will discuss additional concerns and suggest additional improvements.

Thank you.

[The prepared statement of Mr. Hood follows:]

Statement By
EDWIN M. HOOD, PRESIDENT
SHIPBUILDERS COUNCIL OF AMERICA
Accompanied By
Stephen B. Clarkson, Esq., Sullivan & Beauregard, Washington, DC
Stewart E. Niles, Esq., Jones, Walker, Waechter, Poitevent,
Carrere & Denegre, New Orleans, LA
Junius C. McElveen, Jr., Esq., Seyfarth, Shaw, Fairweather
& Geraldson, Washington, DC
Before
Subcommittee on Labor
Senate Committee on Labor and Human Resources
June 17, 1981

Mr. Chairman, members of the Subcommittee.

My role this morning is simply to set the stage for expert testimony by others.

As you may know, the membership of the Shipbuilders Council of America is composed of shipbuilders, shiprepairers and component manufacturers in all sections of the country. Collectively, they constitute about 90 percent of the Nation's shipbuilding industrial mobilization base.

The thrust of our testimony will be that U.S. shipyards have been gravely encumbered by the consequences of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act. The record of the past decade has dramatically demonstrated to us that the Act is administratively burdensome and uninsurable, and most significantly, it has invoked an abusive, excessively expensive pro-claimant bias.

By virtue of the 1972 amendments and subsequent judicial interpretations, the Longshore Act has now been extended to some 150,000 shipyard workers. A greater number of these employees work in controlled industrial areas, shops and offices as opposed to hull erection, shipfitting and shiprepairing over the water. It remains our firm conviction that only the latter category of workers should be "maritime employees" subject to the Act, and the historic water's edge jurisdictions of the Act should be restored.

A 1978 study of Longshore Act experiences within the U.S. shipyard industry by Tillinghast, Nelson and Warren, Inc., consulting actuaries, predicted that 1980 workers' compensation costs would be $1,122 per employee or an increase of 851 percent over 1970. One of our yards reports a somewhat lesser cost of $603 per employee, but this represented an increase over 1970 of 2,868 percent. These tremendous increases are obviously causing great difficulty not only for major shibuilders but for many smaller shipyards.

The manifestation of all of this is in higher costs for the construction of ships in the United States. Our shipbuilders are inhibited from competing on the world market. Costs of urgently needed vessels for the U.S. Navy are greater, putting heavier demands upon the public treasury. To paraphrase a popular theme: more dollars are buying less defense.

Our plea for remedial legislation, such as S-1182 sponsored by you and Senator Nunn, is therefore more than subjective. We commend you both as well as this distinguished Subcommittee for your timely consideration of a pervasive phenomenon which has gotten out of hand and which merits immediate correction. In point of fact, correction is long overdue.

From here, Mr. Chairman, with your permission, Mr. Clarkson, a specialist in naval contracts, will present data relative to the cost experience under the Longshore Act by a major shipbuilder. Mr. Niles, an acknowledged expert on the Longshore Act, will then deal with specific sections of the Act which make it uninsurable. And finally, Mr. McElveen, who has litigated more than 800 cases under the Act, will discuss additional concerns and suggest additional improvements.

REGULAR MEMBERS

Alabama Dry Dock & Shipbuilding Company
P. O. Box 1507
Mobile, AL 36601

The American Shipbuilding Company
512 Florida Avenue, Suite 430
Tampa, FL 33602
AmShip Division, Chicago, IL, Lorain, OH, and Toledo, OH
Tampa Shipyards, Inc., Tampa, FL

Avondale Shipyards, Inc.
P. O. Box 50280
New Orleans, LA 70150

Bath Iron Works Corporation
700 Washington Street
Bath, ME 04530

Bethlehem Steel Corporation
Shipbuilding Division
Bethlehem, PA 18016
Baltimore, MD, Beaumont, TX
Boston, MA, Hoboken, NJ
San Francisco, CA, San Pedro, CA
Sparrows Point, MD

Coastal Dry Dock & Repair Corporation
Brooklyn Navy Yard
Building 131
Brooklyn, NY 11205

General Dynamics Corporation
Pierre Laclede Center
St. Louis, MO 63105
Electric Boat Division, Groton, CT
Electric Boat Division, Quonset Point, RI
Quincy Shipbuilding Division, Quincy, MA and Charleston, SC

Ingalls Shipbuilding Division
Litton Industries
P. O. Box 149
Pascagoula, MS 39567

Jacksonville Shipyards, Inc.
750 East Bay Street
P. O. Box 2347
Jacksonville, FL 32203

Lockheed Shipbuilding & Construction Company
2929 Sixteenth Avenue, SW
Seattle, WA 98134

Marinette Marine Corporation
Ely Street
Marinette, WI 54143

Maryland Shipbuilding & Drydock Company
P. O. Box 537
Baltimore, MD 21203

National Steel & Shipbuilding Company
Harbor Drive at Twenty-Eighth Street
P. O. Box 80278
San Diego, CA 92138

Newport News Shipbuilding
4101 Washington Avenue
Newport News, VA 23607

Norfolk Shipbuilding & Drydock Corporation
P. O. Box 2100
Norfolk, VA 23501
Norfolk, VA (2 plants)
Berkeley, VA

Savannah Shipyard Co.
P. O. Box 787
Savannah, GA 31402

Sun Ship, Inc.
Foot of Morton Avenue
Chester, PA 19013

Todd Shipyards Corporation
One State Street Plaza
New York, NY 10004
Alameda, CA
Brooklyn, NY, Galveston, TX
Houston, TX, Los Angeles, CA
New Orleans, LA, Seattle, WA

Tracor Marine
P. O. Box 13107
Port Everglades, FL 33316

ALLIED INDUSTRIES MEMBERS

Allis-Chalmers Corporation
Milwaukee, WI

Borg-Warner Corporation
York Division
York, PA

Colt Industries, Inc.
Washington, DC

Combustion Engineering, Inc.
Windsor, CT

General Electric Company
Schenectady, NY

Hopeman Brothers, Inc.
Rochester, NY

Jamestown Metal Marine Sales, Inc.
Pompano Beach, FL

Lake Shore, Inc.
Iron Mountain, MI

MacGregor-Comarain, Inc.
Cranford, NJ

Sperry Corporation
New York, NY

Transamerica Delaval, Inc.
Trenton, NJ

Western Gear Corporation
Everett, WA

Westinghouse Electric Corporation
Pittsburgh, PA

Worthington Pump Corporation
Harrison, NJ

NAVAL ARCHITECT MEMBERS

J. J. Henry Company, Inc.
New York, NY

John J. McMullen Associates, Inc.
New York, NY

ASSOCIATION MEMBERS

The American Waterways Operators, Inc.
Arlington, VA

New England Ship Repair Yard Association
East Boston, MA

New York New Jersey Dry Dock Association
New York, NY 10038

Western Shipbuilding Association
San Francisco, CA 94119

Senator NICKLES. Thank you.

Mr. CLARKSON. Mr. Chairman and members of the committee, I am Stephen Clarkson. I am a partner in the Washington, D.C., law firm of Sullivan & Beauregard.

I welcome this opportunity to appear before you and fully support the proposed legislation, S. 1182.

Senator, if I may, I will skip those portions of my prepared testimony dealing with the factual background of this and skip directly to some of the economic data that we wanted to put in front of this committee.

I would first like to summarize briefly the significant aspects of the 1978 study by the independent Tillinghast actuarial firm, which contains what is to date the only industry data compiled and analyzed from the country's shipyards.

The Tillinghast study showed first that during the decade of the 1970's, the rate of increase in the workmen's compensation costs was projected to be six times the rate of increase in payroll. The study shows that from 1970 to 1980, workmen's compensation benefits were to increase by 851 percent. By comparison, in 1980, wages were then expected to increase only 124 percent from 1970.

The Tillinghast study next showed that beginning with 1973 claims, workmen's compensation costs were nearly three times higher than in the period 1970 to 1972, and were increasing at almost twice the pre-1973 rate. The study concluded that the abrupt, upward turn in workmen's compensation costs after 1972 was primarily attributable to the 1972 revisions to the Longshoremen's Act. The study concluded that the liberality of the Longshoremen's Act, compounded by the confusion surrounding its administration, is an invitation to misuse of benefits. The study gathered data that showed that when employment is high, workers' compensation costs dropped; when employment dwindles, claims and benefit costs increase sharply.

The Tillinghast study further demonstrated that the Longshoremen's Act benefit increases have far outpaced the growth of related economic indices and have been considerably larger than Congress anticipated when the law was enacted.

In preparation for this hearing, we were also able to obtain actual data from Newport-News Shipbuilding and Drydock Co., which updates the Tillinghast study with some additional hard figures and demonstrates that the Tillinghast economic impact conclusions were probably conservative; indeed, they were much lower than the actual experience which at least the one yard is undergoing through the middle of 1981.

Exhibit C to my testimony shows that in 1970, the total workers' compensation costs at Newport-News Shipyard were under $400,000 per annum. However, by the end of 1981, the annual cost at Newport-News Shipyard has jumped to almost $15 million per year. The cumulative cost during the decade has been over $52 million.

The chart also shows the amount of the workmen's compensation costs allocated to Government contracts, and thus paid by the U.S. taxpayers. Since 1973, the first full year impacted by the 1972 amendments, the cumulative workers' compensation costs borne by the United States has been over $26 million. This is the number, I remind you, from just a single shipyard.

Exhibit D projects the current experience at Newport-News Shipyard under the Longshoremen's Act, and shows that by 1990, the annual cost may be in the range of $43 million per annum.

Exhibit E analyzes the workmen's compensation costs at Newport-News per employee—and here, I have a correction, Senator, from the written statement. It shows that the percentage of increase has not been just the 851 percent for the period 1970 to 1980 projected by the Tillinghast firm; it has been 2,868 percent for that period, based on total roll, and using just production and maintenance figures as Tillinghast did, it is 2,944 percent. Further, for the period 1972 through 1982, which may be more significant, really, because it tracks the passage of the act, the increase is estimated at the 4,378 percent which you see in my written statement.

I asked Newport-News also to provide me with the answer to the question, "What are the Longshoremen's Act workmen's compensation costs involved in building a *Nimitz* class aircraft carrier?" Newport-News provided me with this data, which is set forth on exhibit L to this testimony. The data utilized in that exhibit relates to the CVM-70, which is the carrier *Carl Vinson*. Work on the *Vinson* was begun in 1972, and it is presently projected to be delivered by March 31, 1982. As exhibit L shows, the workmen's compensation costs allocated to that single ship by the time of delivery will be approximately $9.5 million.

Neither the shipbuilding industry nor the Congress, given the quick chronology of the passage of the 1972 amendments, had the opportunity to analyze the extent of increased coverage of people working ashore or the cost ramifications of such coverage. We do not mean to suggest in any way that employee compensation benefits were adequate in 1970, and did not need at that time to be improved. Indeed, they have been under the Virginia Act, as well. We simply ask the opportunity to demonstrate that the additional costs have exceeded to a great degree any costs which could have been or were perceived in anyone's wildest imagination.

The shipbuilding industry is extremely heterogeneous, ranging from large yards, some with over 20,000 employees which are members of the Shipbuilders' Council of America, to literally hundreds of smaller shipyards, down to small entrepreneurships 20 or so employees. It is estimated that within this industry, the number of employees subject to the more expensive Federal benefit levels was tripled by the 1972 amendments.

As many of you are well aware, the U.S. shipbuilding industry engaged in building ocean ships, while it has a proud history, has been buffeted in recent decades by economic factors far beyond its control. Low labor and material costs at Japanese and European yards, in particular have made it impossible for the U.S. yards to compete with their foreign competition, which have costs which range up to approximately half of those costs facing American yards, without some assistance from the U.S. Government.

The effect of the 1972 amendments has been to further increase the disparity in costs between American and foreign yards.

All shipyards, whether large or small, operate on a small margin and cannot absorb the impact of even minor additional unanticipated costs. As I noted earlier, the elimination of the water's edge limit of the act is discriminatory to the shipbuilding and ship repairing industry. No other industry located on navigable waterways is so affected. We ask first, why has the shipbuilding industry been singled out for this inequity, and second, why, given the current inflationary environment, when unnecessary costs to the taxpayers should be eliminated, should this inequity be permitted to continue at great expense to all citizens.

Thank you. I will be happy to answer any questions which you may have now or at your pleasure, we can wait until Mr. Niles and Mr. McElveen have testified.

[The prepared statement of Mr. Clarkson follows:]

STATEMENT OF STEPHEN B. CLARKSON
SPECIAL COUNSEL FOR THE SHIPBUILDERS
COUNCIL OF AMERICA

SUBCOMMITTEE ON LABOR OF THE
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

HEARINGS ON S.1182,
TO RECTIFY BURGEONING COSTS OF PERVASIVE BENEFITS
UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

WASHINGTON, D.C.
JUNE 17, 1981

Statement of Stephen B. Clarkson,
Special Counsel for the Shipbuilders
Council of America, Respecting S. 1182,
To Amend the Longshoremen's and Harbor
Workers' Compensation Act

Mr. Chairman and Members of the Committee:

I am Stephen B. Clarkson. I am a partner in the Washington, D.C. law firm of Sullivan & Beauregard. My practice embraces litigation, including Government contract litigation and third-party lawsuits under the Federal Longshoremen's and Harbor Workers' Compensation Act ("Longshoremen's Act" or "LHWCA"). In the area of workers' compensation, my firm has represented self-insured employers, principally Newport News Shipbuilding and Dry Dock Company, and insurance companies. I have been familiar with the jurisdictional aspects of the Act since 1973.

I welcome and appreciate this opportunity to appear before you and fully support the proposed legislation -- S. 1182 -- which will among other things afford relief to the United States shipbuilding companies from unanticipated discrimination and inequity which has arisen under the 1972 amendments to the Longshoremen's Act.

As Mr. Hood indicated, the presentation today on behalf of the Shipbuilders Council of America and other shipyards similarly situated will be divided into three parts. First, I shall endeavor to provide this Committee with such cost impact data as we have been able to gather in order to give the Committee some concept of the economic impact parameters of the 1972 Amendments to the Longshoremen's Act, which the instant bill, S. 1182, is designed to ameliorate, at least in part. Secondly, Mr. J. C. McElveen, will explain to the Committee his own experiences with the administrative procedures under the Act and the ways in which the original intent of Congress has been subverted by administrative and judicial rulings leading to substantial unanticipated and unnecessary costs. Thirdly, Mr. Stewart Niles along with Mr. McElveen one of the country's most knowledgeable lawyers in handling workmen's compensation claims under both state and Federal statutes, will provide this Committee with significant background history of the Longshoremen's and Harbor Workers' Compensation Act, the amendments thereto, and the judicial interpretations which have arisen under that Act.

In other words, I will explain the magnitude of the dramatically increasing costs under the Act, Mr. McElveen and Mr. Niles will explain why and how it is that the costs have become so great and so unreasonable.

I. The 1972 Amendments To The Longshoremen's Act.

The original Longshoremen's and Harbor Workers' Compensation Act of 1927 had the purpose of providing compensation to a group of employees who could not validly be covered by any state compensation statute; i.e., those employees who were injured over navigable waters. The original Act made it clear that

Federal compensation was to be paid only if recovery "through workmen's compensation proceedings may not validly be provided by state law." In 1927 Congress sought only to extend a Federal compensation remedy to workmen injured beyond the pier and hence beyond the jurisdiction of the respective States.

After a series of significant Supreme Court decisions, which Mr. Niles will explain in further detail, the Congress in 1972 sought for the first time to extend the Federal compensation remedy to land-based injuries. Section 2 of the Act redefined "employee" so as to specifically include any person engaged in shipbuilding. Similarly, the definition of "employer" was broadened substantially. Under the 1972 Amendments "any adjoining pier, wharf, dry dock, terminal, building way, marine railway or other adjoining area customarily used by employer in loading, unloading, repairing or building a vessel" was specifically included in the area where Federal compensation was to be applicable. In spite of a long-standing and constitutionally well-founded basis for treating land and water injuries differently, the Congress attempted to extend its jurisdiction to those areas previously held to be under State jurisdiction.

As Mr. Niles will also explain, these changes in the Act were made at the last minute without hearings or testimony and without regard to the tremendous potential impact of the new form of compensation coverage. Thereby Congress placed the United States shipbuilding industry in an untenable position, singling out shipbuilders as the only industry in the United States to pay Federal compensation for land injuries.

Under the Federal Longshoremen's Act, the compensation rate is 200% of the national average weekly wage. This compares, for example, in the case of Virginia where Newport News Shipbuilding and Dry Dock Company, the nation's largest shipyard, is located, to a state act providing a maximum compensation rate of 100% of the average state weekly wage. Attached as Exhibit A to my testimony are a series of charts showing the increases from 1971 through 1980 in maximum compensation rates, longshore rate versus State weekly rate. In the case of Virginia, for example, Exhibit A shows that by 1980 the maximum Federal rate was approximately $460 per week per employee, while the State rate remained at $220 per week. Thus the difference is approximately $240 per week per employee.

II. The 1978 Tillinghast Report On The Economic Impact Of The 1972 Amendments.

In October 1978, the actuarial firm of Tillinghast, Nelson and Warren, Inc., having been retained by the Shipbuilders Council of America ("SCA"), to examine the worker's compensation experience of SCA members and the impact of the 1972 amendments to the Longshoremen's Act, submitted a report which (1) identified the costs and rates of change in costs caused by the 1972 amendments which had expanded coverage and increased benefits, (2) noted changes that may have arisen in the administration of the law in a manner not anticipated by the legislation, and (3) reflected economic inflation as reflected by Government indices. A copy of that report is attached to this testimony as Exhibit B.

If I may, I would like to summarize briefly the significant aspects of that study which contains what is to date the only composite data compiled and analyzed from the country's major shipyards.

(1) The Tillinghast study showed, first, that during the decade of the 1970's the rate of increase in the workmen's compensation costs was projected to be six times the rate of increase in payroll. Figure 1 (p. 7) in the study shows that by 1980 workmen's compensation benefits were then expected to average $1,122 per employee, an increase of 851% over 1970. By comparison, in 1980, wages were then expected to average $16,471, an increase of only 124% over 1970.

(2) The Tillinghast study next showed (Figure 2, p. 9) that, beginning with 1973 claims, worker's compensation costs were nearly three times higher than in the period 1970 to 1972 and were increasing at almost twice the pre-1973 rate. The study concluded that the abrupt upward turn in workmen's compensation costs after 1972 was primarily attributable to the 1972 revisions to the Longshoremen's Act.

(3) The study concluded that the liberality of the Longshoremen's Act, compounded by the confusion surrounding its administration, is an invitation to misuse of benefits. The

study gathered data which showed that when employment is high worker's compensation costs drop; when employment dwindles, claims - and benefit costs - increase sharply. I direct your attention to Figure 3, p. 11, in the study which demonstrates this finding.

(4) The Tillinghast study demonstrated that the Longshoremen's Act benefit increases have far outpaced the growth of related economic indices and have been considerably larger than Congress anticipated when the law was enacted. Figure 4 on page 11 of the study shows that while related economic indices went from approximately 100 to 140 in the period 1971 through 1976, Federal worker's compensation benefit cost increases went from approximately 145 to 450.

III. Recent Data From Newport News Shipbuilding And Dry Dock Company.

The Committee members will note that the Tillinghast study was submitted in 1978 and that its data for the entire decade through 1980 is based in part upon projections from actual data which was largely available only through 1976.

The Tillinghast study has not been updated. However, in preparation for this hearing, we were able to obtain actual data from Newport News Shipbuilding and Dry Dock Company which updates the Tillinghast study with some additional hard figures and demonstrates that the Tillinghast economic impact conclusions were conservative. Indeed, they were much lower than the actual experience which at least that one yard is undergoing through the middle of 1981. The new data from Newport News Shipbuilding is set forth on Exhibit C to this testimony.

That chart, Exhibit C, shows that in 1970 the total worker's compensation costs at Newport News Shipyard were under $400,000, specifically $384,749. However, by the end of 1981 the annual cost at Newport News Shipbuilding has jumped to almost $15 million, specifically $14,955,000.*/ The cumulative cost during the decade has been over $52 million, specifically $52,320,467. That figure compares to $3.85 million which the company might have expected based upon the 1970 data and before taking into effect reasonably anticipatable inflationary impact.

The Committee will note from the chart that the total employment roll at the shipyard has been relatively stable since 1972, being 26,000 in 1972, and 24,000 in 1981. The chart also shows the amount of the workmen's compensation costs allocated to Government contracts and thus paid by the United States taxpayers. Since 1973, the first full year impacted by the 1972 amendments, the cumulative workmen's compensation cost borne by the United States has been $26,718,970. This is the number from just a single shipyard!

---

*/ The figures in the "Total" line on Exhibit C represent just actual out-of-pocket payments and do not include annual changes on the company's reserve account for future payments. Changes in the reserve account for the period 1970-1981 averaged annually an additional 21% of the amount reflected as "Total". The full real cost from an accounting perspective includes the changes in the reserve account.

Exhibit D to this testimony is a line chart analysis of the data from Newport News Shipbuiding shown on Exhibit C. Exhibit D projects the current experience of Newport News Shipbuilding under the Longshoremen's Act and shows that by 1990, at the end of the current decade, unless something is done to ameliorate the situation, the workmens' compensation costs payable by Newport News Shipbuiding will be in the range of $43 million per annum.

Exhibits E through K to this testimony present the Newport News data from the decade of the 1970's in other graphic ways which should be helpful to the Committee in order to understand the economic impact of the shipbuilders' experience under the Act.

Exhibit E analyzes the workmen's compensation costs at Newport News per employee. It shows that the percentage of increase since 1972 has not been just the 851% projected by the Tillinghast firm; it has been 4,378.2%!

Exhibit F through K set forth in bar graph form the numerical data found on Exhibit C, Newport News Shipbuilding's experienced workermen's compensation costs during 1970-1980.

IV. Dollar Impact Of Workmen's Compensation Costs On the Price Of A Nimitz-Class Aircraft Carrier.

In order to provide this Committee with still another guideline as to the economic impact of the Longshoremen's Act compensation costs in the area of new ship construction for the United

States Navy, I asked Newport News Shipbuilding to provide me with an answer to the question "What are the Longshoremen's Act workmen's compensation costs involved in building a Nimitz-class aircraft carrier?" Newport News Shipbuilding provided me this data which is set forth on Exhibit L to this testimony. The data utilized on that exhibit relates to the CVN 70 which is the CARL VINSON. Work on the VINSON was begun in 1972 and it is presently projected to be delivered by March 31, 1982. As Exhibit L shows, the workmen's compensation costs allocated to that ship by the time of delivery will be approximately $9.5 million. I am confident that we all agree that $9.5 million on a single vessel is by no means an insignificant amount of money, the elimination of at least a portion of which could be well used elsewhere by the Government or saved to the taxpayers of this country.

V. Relationship Between Social Secrity Act Benefits and LHWCA Benefits.

As Mr. McElveen will explain, the shipbuilders feel that in a fairly large number of situations, such as low-level hearing loss in elderly former shipyard workers, Longshoremen's Act benefits are related only minimally to shipyard job-related injury and are often referred to as an "additional retirement check" or social security type benefit. Accordingly, it is pertinent to note for the Committee's edification the relationship between Social Security and Longshoremen's Act benefits.

A. The Existing Law.

The Longshoremen's Act does not provide an offset of any benefits awarded under that Act, notwithstanding the existence of other wage-loss compensation benefits which may be payable to the claimant. Other wage-loss compensation benefits may be in the form of physical disability, economic unemployment, or old age benefits flowing from Federal, state, local, or private programs. Although the Act does not provide for coordinating compensation benefits, other programs, such as the Federal Social Security Act, do provide for limited offsets.

The Social Security Act, 42 U.S.C. § 301, *et seq*., explicitly provides for a reduction in *disability benefits* available under that Act, 42 U.S.C. § 423, where an individual *prior to age 62* is also receiving workmen's compensation (under any Federal or state law or plan, including the LHWCA) and the sum of such benefits (Social Security and workmen's compensation) exceed 80 percent of the individual's "average current earnings." 42 U.S.C. § 424a(a). The Social Security Act offset provision, as now enacted, is limited solely to workmen's compensation benefits. It is clearly applicable to the LHWCA. *Ladner v. Secretary of Health, Educ. & Welfare*, 304 F. Supp. 474 (S.D. Miss. 1969). The provision also provides that the offset will not be made if the workmen's compensation law or plan under which the benefit is paid itself provides for a reduction when the individual is entitled to benefits under the disability provision of the Social Security Act. 42 U.S.C. § 424a(d).

B. The Proposed S. 1182 Offset Provision.

S. 1182 would, by Section 11(g), amend Section 14 of the Act, 33 U.S.C. § 914, by adding a new subsection which would limit "compensation or death benefits" under the Act if aggregate benefits from and under the LHWCA, the Social Security Act (old-age, survivors, and disability benefits), the Employee Retirement Income Security Act of 1974, unemployment compensation (apparently from any source), and "any other workers' compensation benefit," exceed 80 percent of the employee's "spendable earnings" as defined by the amended Act.

C. Summary.

The existing Social Security Act provides for an offset of disability benefits thereunder if the claimant is also receiving Longshoremen's Act benefits and the sum of both exceeds a certain threshold amount. The existing LHWCA does not have an offset provision for coordinating compensation with other wage-loss benefits programs. These proposed Longshoremen's Act amendments under S. 1182 would provide an appropriate offset mechanism taking into account most other public wage-loss benefit programs.

VI. Conclusion.

Neither the shipbuilding industry nor the Congress, given the quick chronology of the passage of the 1972 Amendments after the extension to shoreside was added, had the opportunity to analyze the extent of increased coverage of people working ashore, or the cost ramifications of such coverage.

We do not mean to suggest in any way that employee compensation benefits were adequate in 1972 and did not need at that time to be improved. We simply as k the opportunity to demonstrate that the additional costs have exceeded to a great degree any costs which could have been or were perceived in anyone's wildest imagination.

The shipbuilding industry is extremely heterogeneous, ranging from large yards, some with over 20,000 employees, which are members of the Shipbuilders Council of America, to literally hundreds of smaller shipyards, down to small entrepreneurships of twenty or so employees. It is an industry which has no overall industry association. Therefore it is not possible to present full factual data as to total number of employees or the dollar impact of the 1972 Amendments.

However, in 1973 an Ad Hoc Committee of Shipbuilders gathered data which indicated:

(1) The total number of workers covered under the Federal Act prior to November, 1972 was approximately 21,561.

(2) Prior to November, 1972, approximately 42,315 workers were covered by State workmen's compensation laws.

(3) Therefore, the number of additional on-shore employees made subject to the Federal Act, rather than the State

Workmen's Compensation laws, by the 1972 Amendments was that same figure - 42,315. Thus, the number of employees subject to the more expensive Federal benefit levels was tripled by the 1972 Amendments.

As many of you are well aware, the United States shipbuilding industry engaged in building ocean ships, while it has a proud history, has been buffeted in recent decades by economic factors far beyond its control. Low labor and material costs, at Japanese and European yards in particular, have made it impossible for the United States yards to compete with their foreign competition, which have costs which range up to approximately half of those costs facing American yards, without some assistance from the United States Government. From time to time, this Congress and the succeeding Administrations of both political parties have reiterated the National policy to maintain a viable U.S. shipbuilding industry. This policy flows from a recognition that National defense and foreign commercial trade considerations militate against the debilitation and elimination of United States shipbuilding capability. Whatever the needs for military ships during a particular period of time may be, it is clear that the capability to build ships of substantial size should be preserved. And, during peacetime, for the United States to fill its need for ships solely through purchases abroad would have a substantial adverse effect on the United States balance of payments.

The effect of the 1972 Amendments has been to further increase the disparity in costs between American and foreign shipyards.

All shipyards, whether large or small, operate on a small margin and cannot absorb the impact of even minor additional unanticipated costs. As I noted earlier, the elimination of the "water's edge" limit of the Act is discriminatory to the shipbuilding and shiprepairing industry. No other industry located on navigable waterways is so affected. We ask, first, "Why has the shipbuilding industry been singled out for this inequity?" and, second, "Why, given the current inflationary environment when unnecessary costs to the taxpayer should be eliminated, should this inequity be permitted to continue at great expense to all citizens?"

Thank you. I will be happy to answer now any questions which you may have, or perhaps, at your pleasure, Mr. Niles and Mr. McElveen can first present their testimony, which may contain some of the answers; and all three of us can field questions afterward.

MAXIMUM COMPENSATION RATES
SELECTED MARITIME STATES vs LHWCA
BY YEAR SINCE 1971

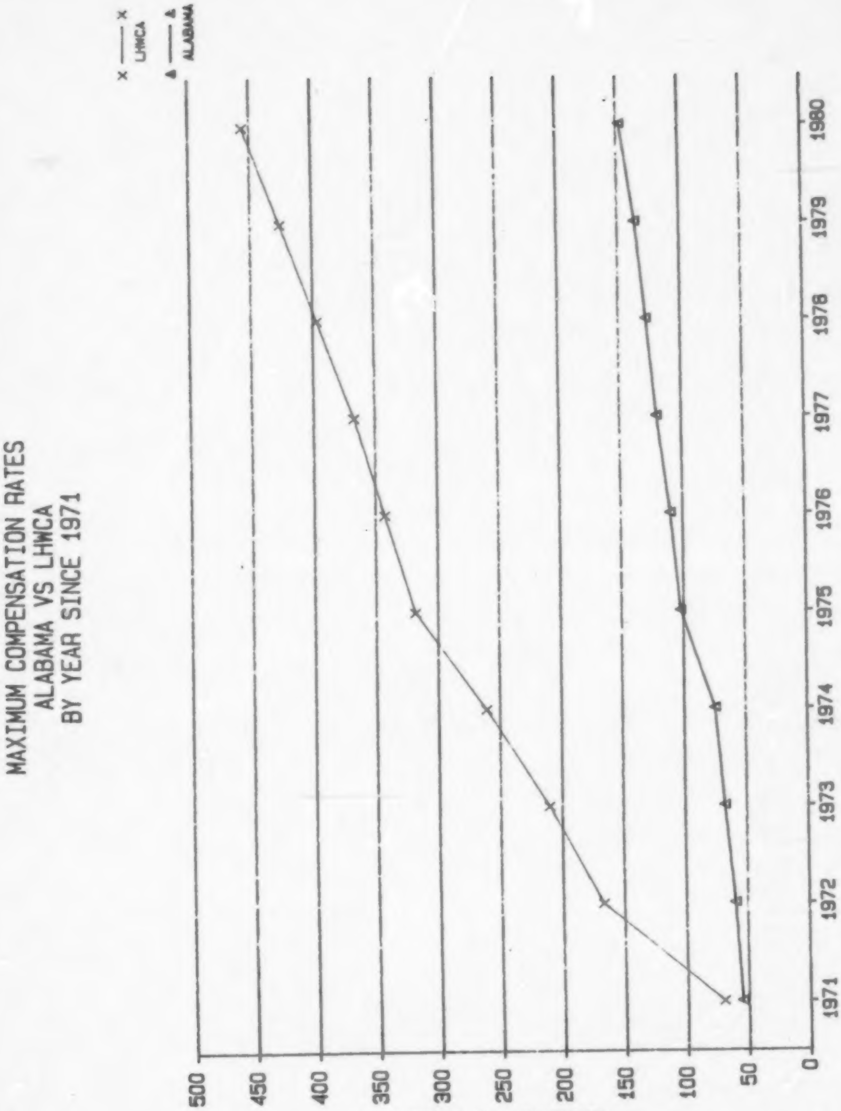
DATA AS OF JANUARY 1 OF SUCCEEDING YEAR

SOURCE: U. S. CHAMBERS OF COMMERCE
ANALYSIS OF WORKERS' COMPENSATION LAWS

YEAR	ALABAMA	CALIFORNIA	CONNECTICUT	FLORIDA	GEORGIA	LOUISIANA	MAINE	MASSACHUSETTS	MISSISSIPPI	NEW JERSEY	NEW YORK	TEXAS	VIRGINIA	LHWC
1971	$ 55.00	$ 70.00	$ 95.00	$ 56.00	$ 50.00	$ 49.00	$ 78.00	$ 77.00	$ 40.00	$101.00	$ 80.00	$ 49.00	$ 62.00	$ 70.00
1972	60.00	70.00	153.00	66.00	50.00	49.00	81.42	80.00	56.00	108.00	80.00	49.00	70.00	167.00
1973	68.00	119.00	168.00	80.00	65.00	65.00	83.00	90.00	56.00	108.00	80.00	63.00	80.00	210.54
1974	75.00	119.00	178.00	98.00	80.00	65.00	131.29	95.00	63.00	119.00	95.00	70.00	91.00	261.00
1975	102.00	119.00	189.00	112.00	95.00	85.00	141.41	95.00	63.00	128.00	95.00	70.00	149.00	318.38
1976	110.00	154.00	202.50	119.00	95.00	95.00	151.84	140.00	84.00	138.00	95.00	77.00	162.00	342.54
1977	120.00	154.00	220.50	126.00	95.00	130.00	220.88	150.00	91.00	146.00	125.00	91.00	175.00	367.22
1978	128.00	154.00	306.00	130.00	110.00	140.00	231.72	211.37	91.00	156.00	215.00	105.00	187.00	396.78
1979	136.00	154.00	261.00	211.00	110.00	149.00	306.23	227.21	98.00	185.00	215.00	119.00	199.00	426.26
1980	148.00	175.00	285.00*	228.00	110.00	163.00	322.17	245.48	98.00	199.00	215.00	133.00	213.00	456.24

(* to $427.50 in specified cases)

EXHIBIT A
Page 1



MAXIMUM COMPENSATION RATES
ALABAMA VS LHWCA
BY YEAR SINCE 1971

EXHIBIT A
Page 2

MAXIMUM COMPENSATION RATES
CALIFORNIA VS LHWCA
BY YEAR SINCE 1971

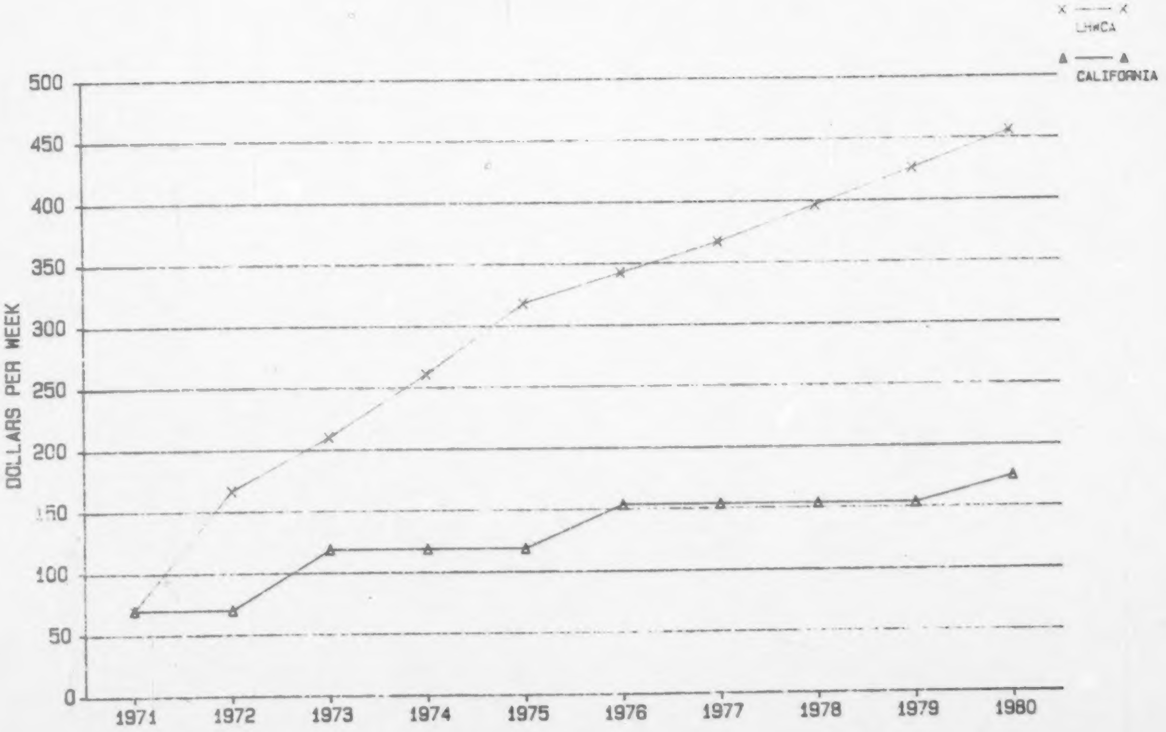


EXHIBIT A
Page 3

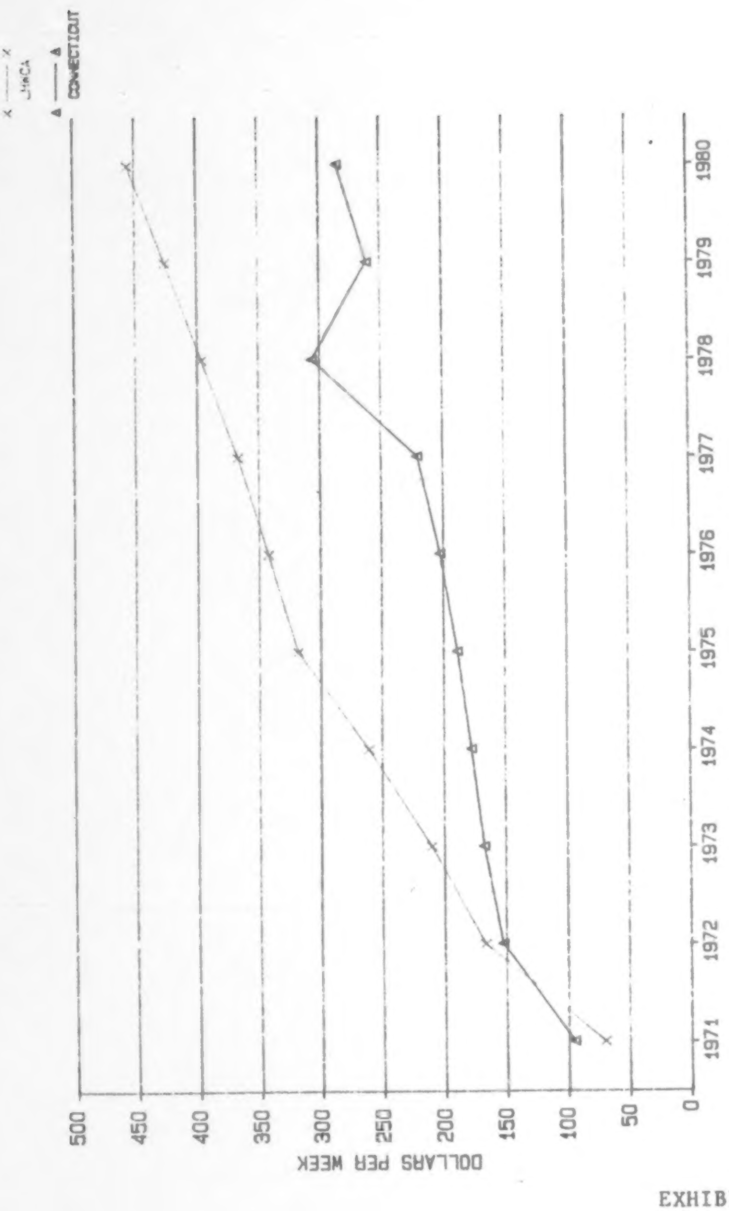
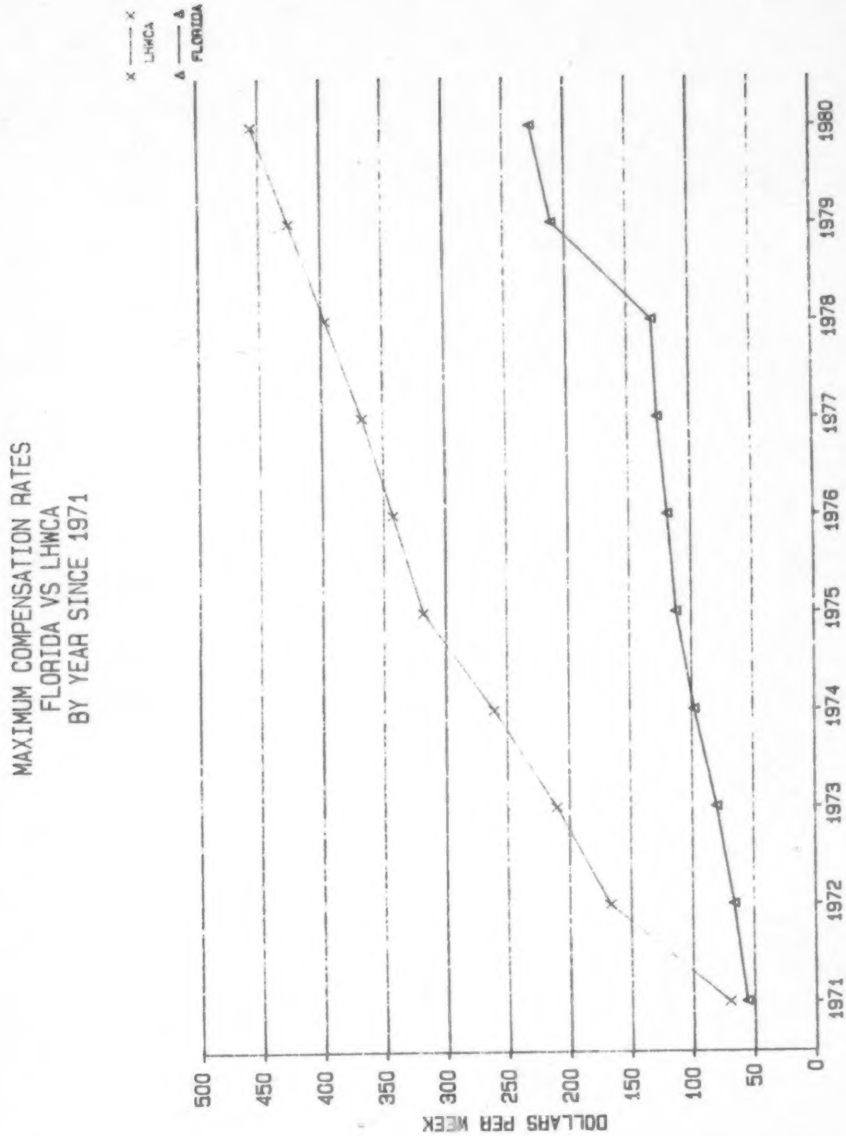

MAXIMUM COMPENSATION RATES
CONNECTICUT VS LHWCA
BY YEAR SINCE 1971

EXHIBIT A
Page 4



MAXIMUM COMPENSATION RATES
FLORIDA VS LHWCA
BY YEAR SINCE 1971

EXHIBIT A
Page 5

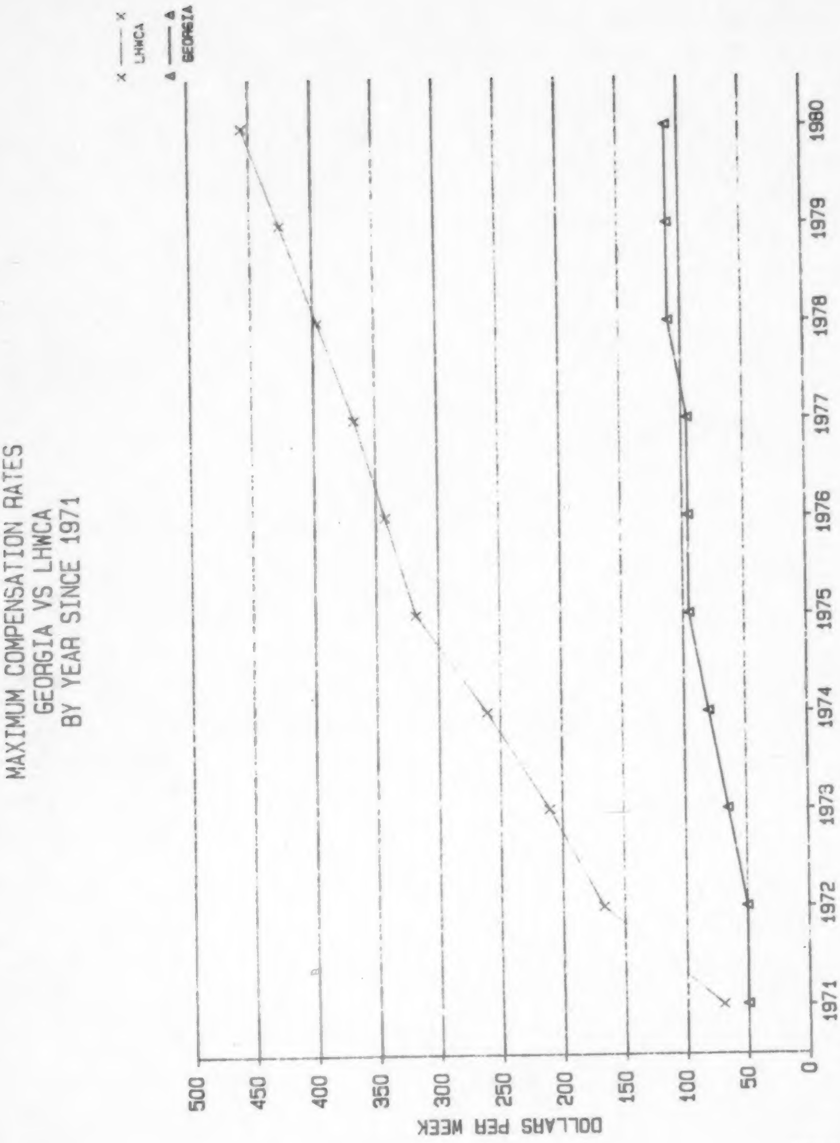


EXHIBIT A
Page 6

MAXIMUM COMPENSATION RATES
LOUISIANA VS LHWCA
BY YEAR SINCE 1971

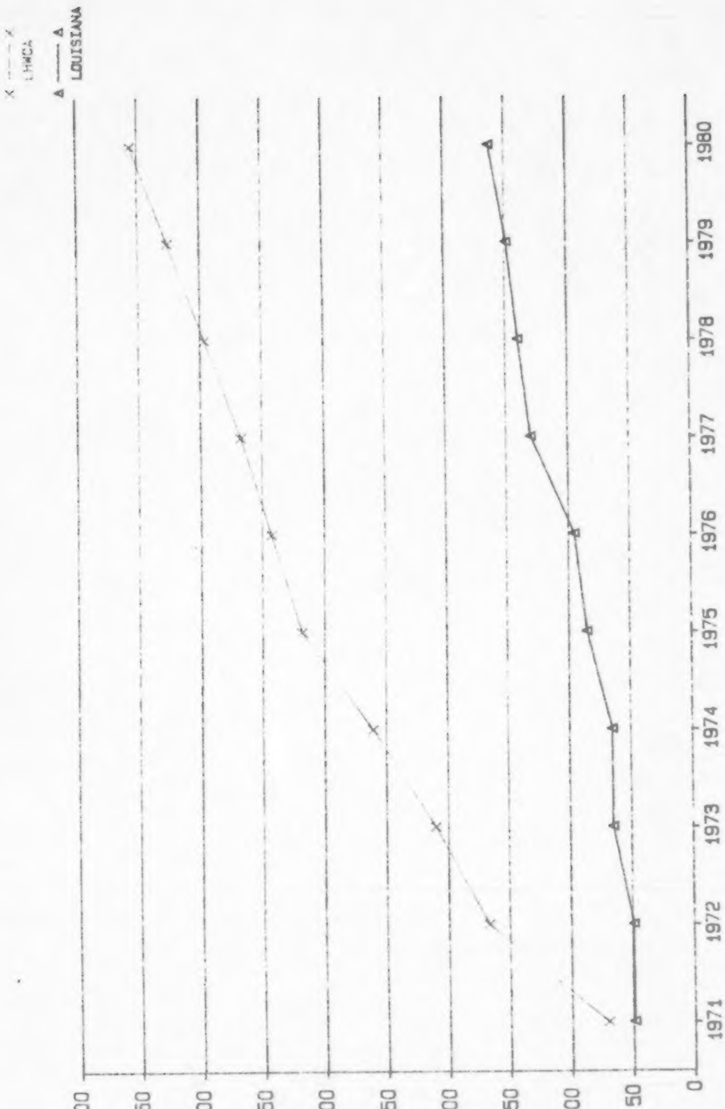


EXHIBIT A
Page 7

MAXIMUM COMPENSATION RATES
MASACHUSETTS VS LHWCA
BY YEAR SINCE 1971

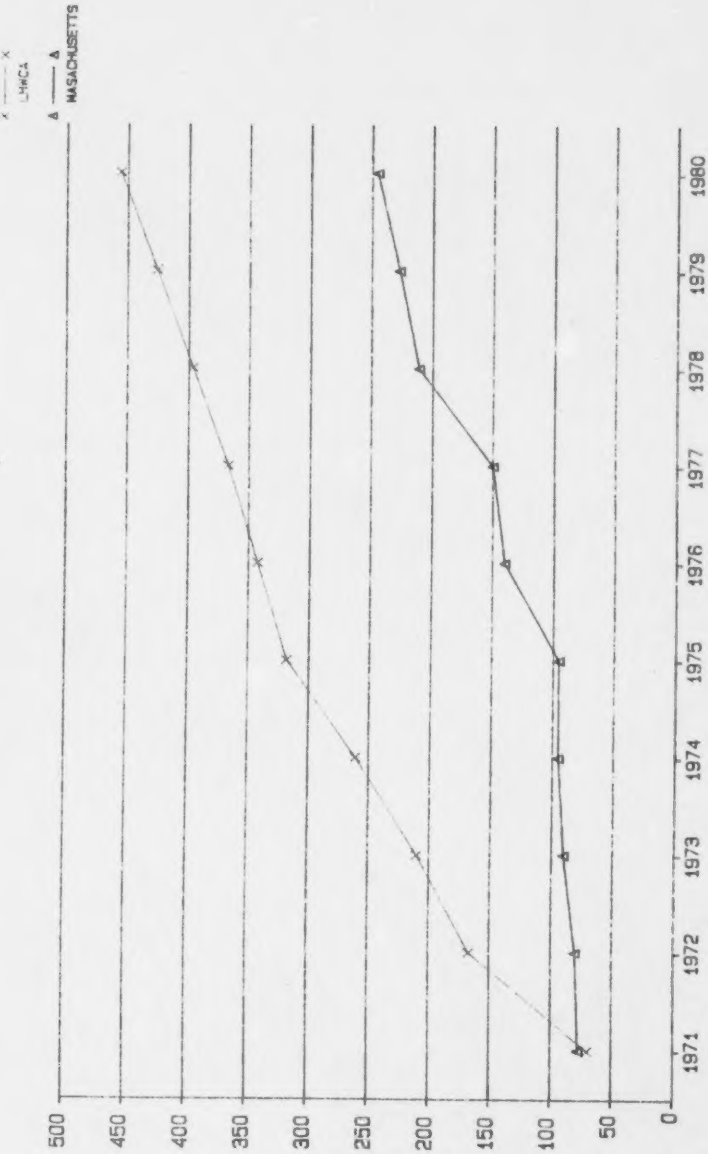


EXHIBIT A
Page 8

MAXIMUM COMPENSATION RATES
MISSISSIPPI VS LHWCA
BY YEAR SINCE 1971

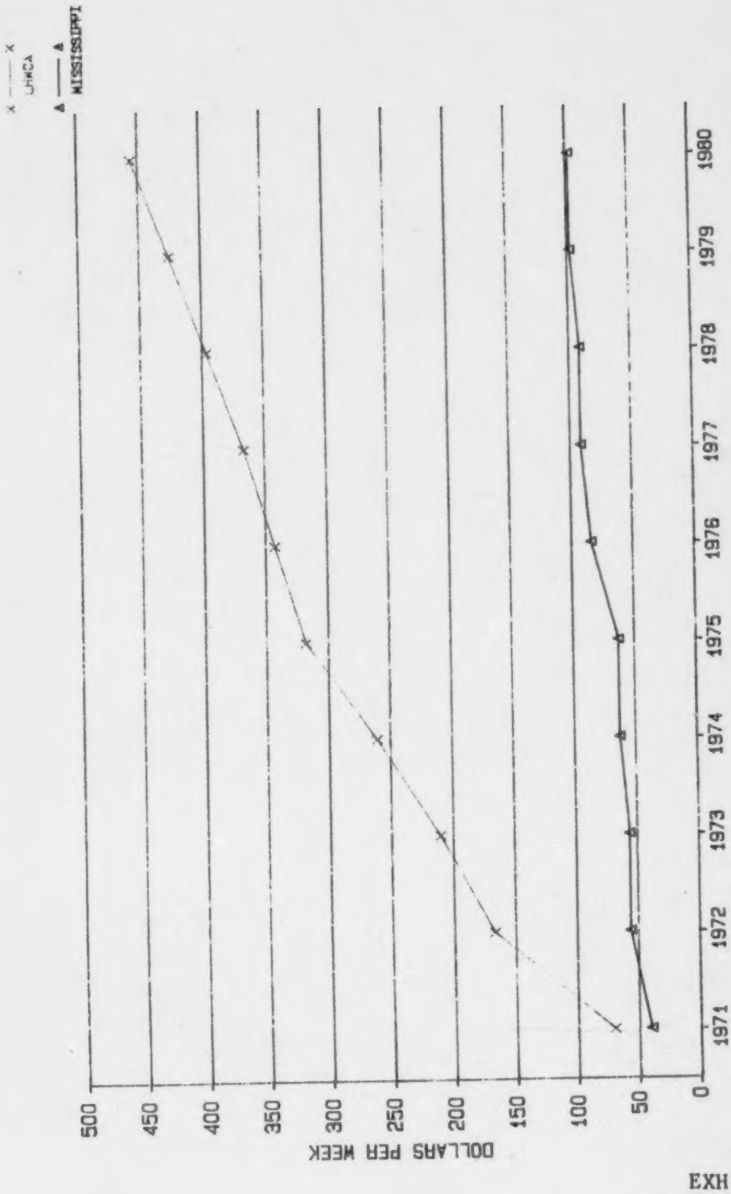


EXHIBIT A
Page 9

MAXIMUM COMPENSATION RATES NEW JERSEY VS LHWCA BY YEAR SINCE 1971

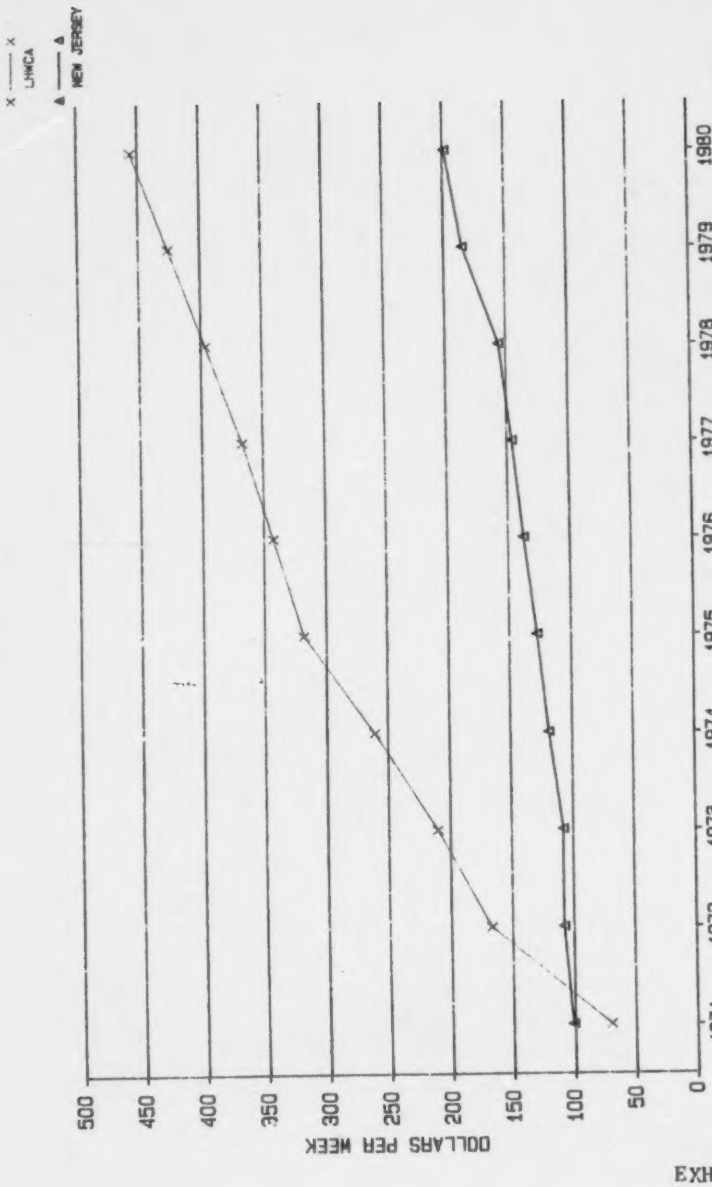


EXHIBIT A
Page 10

MAXIMUM COMPENSATION RATES
NEW YORK VS LHWCA
BY YEAR SINCE 1971

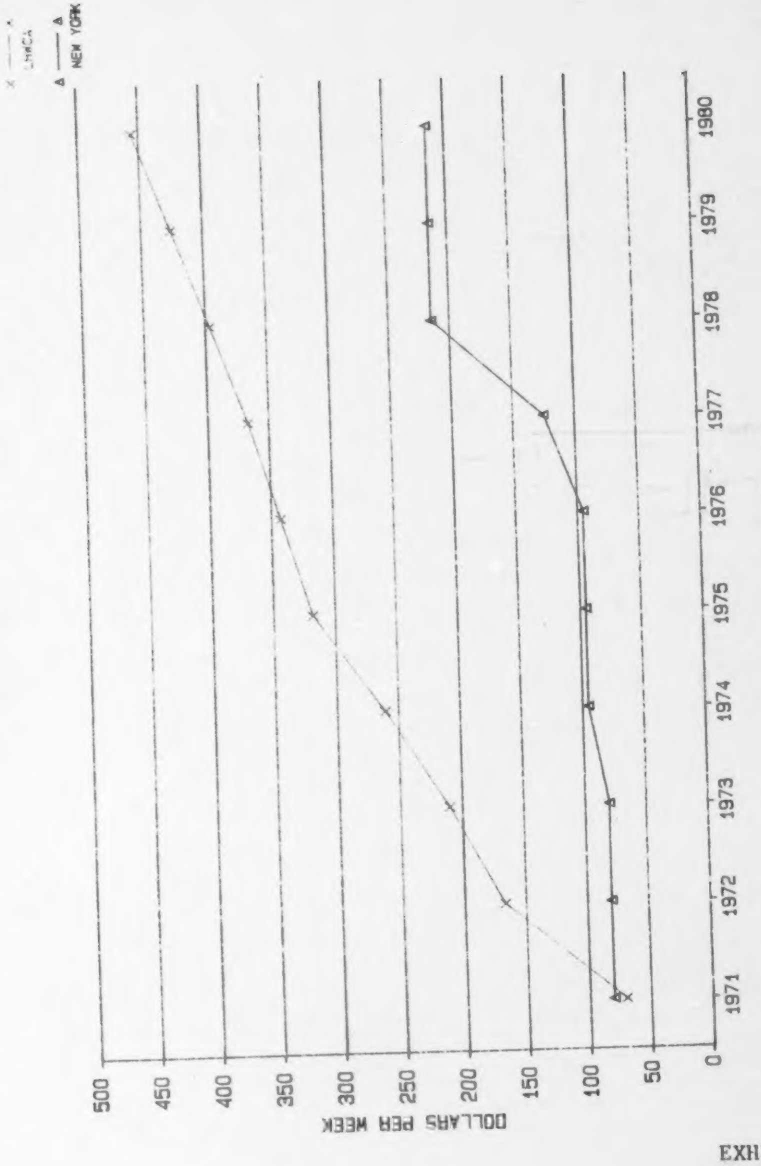


EXHIBIT A
Page 11

MAXIMUM COMPENSATION RATES
TEXAS VS LHWCA
BY YEAR SINCE 1971

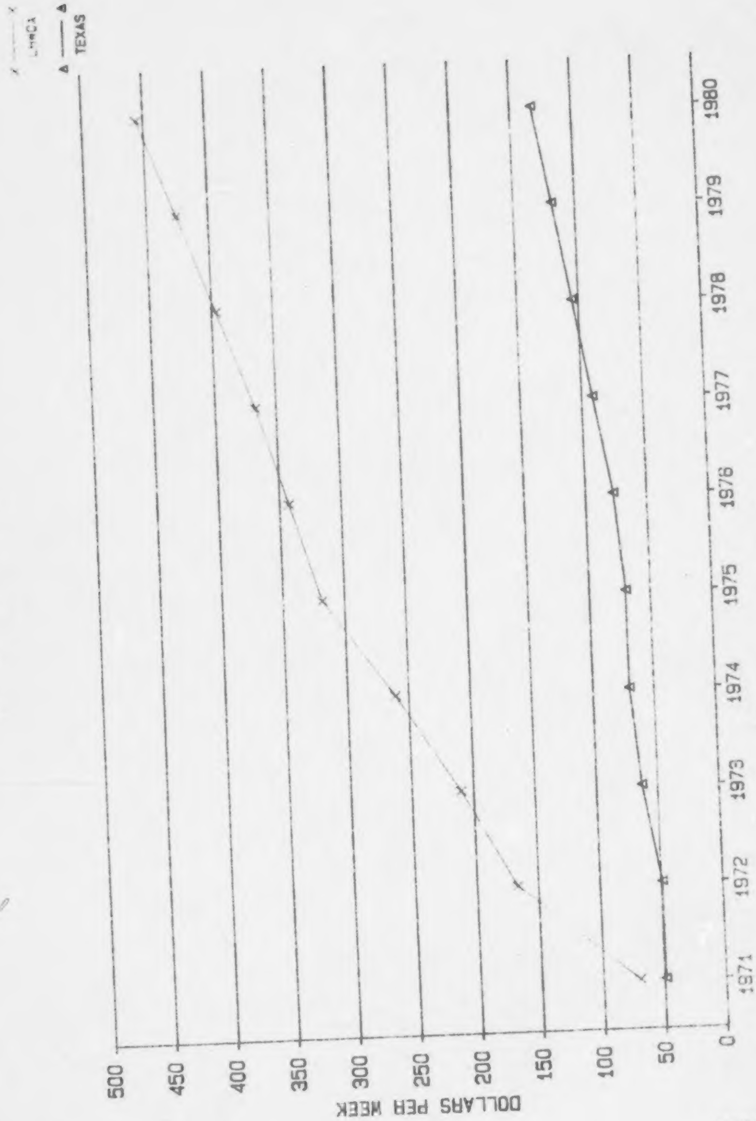


EXHIBIT A
Page 12

MAXIMUM COMPENSATION RATES
VIRGINIA VS LHWCA
BY YEAR SINCE 1971

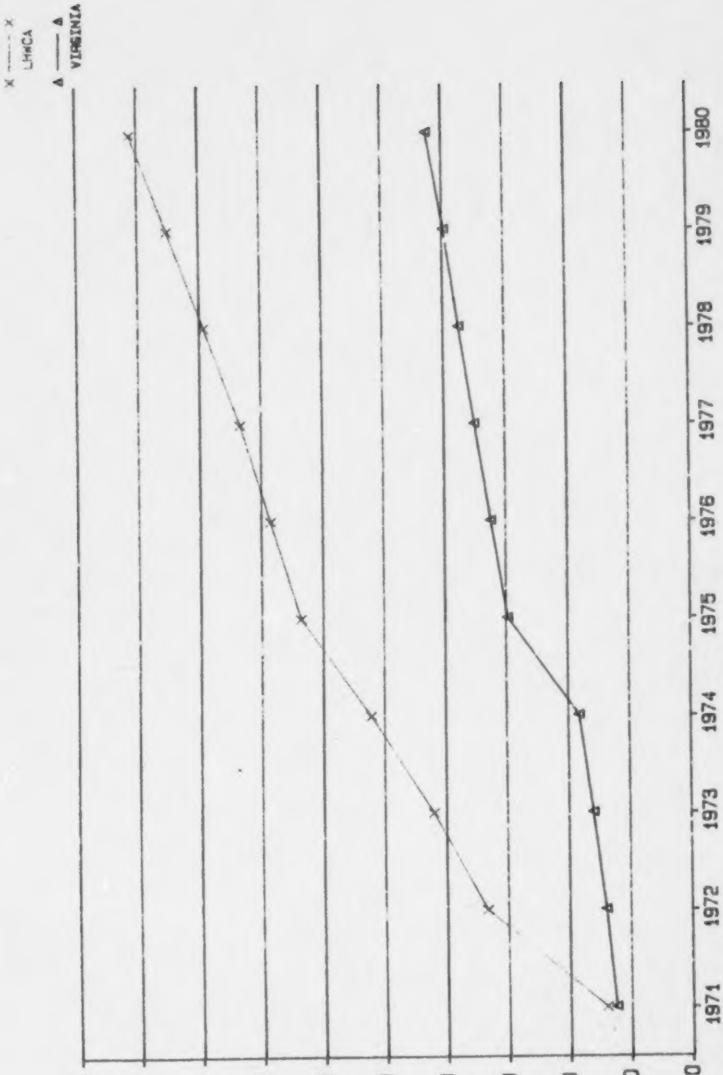


EXHIBIT A
Page 13

EXHIBIT B

SHIPBUILDERS COUNCIL OF AMERICA

A Report on Longshoremen's & Harbor Workers' Compensation Act Experience

October 1978

The firm of Tillinghast, Nelson & Warren, Inc. (TN&W), actuaries and consultants, has been retained by the Shipbuilders Council of America (SCA) to examine the workers' compensation experience of SCA members and the impact of the Longshoremen's & Harbor Workers' Compensation Act (LHW Act) revisions of 1972 on that experience.

The study was designed to separately identify the costs and the rates of change in costs caused by

- the November 1972 amendments to the LHW Act—which expanded coverage and increased benefits;
- any changes that may have arisen in the administration of the law in a manner not anticipated in the legislation; and
- economic inflation, as reflected by government indices.

CONTENTS

Section 1. A brief statement of the conclusions 5

Section 2. The data forming the basis of the report 15

Section 3. Detailed report of the findings. 21

Section 4. Appendices. 27

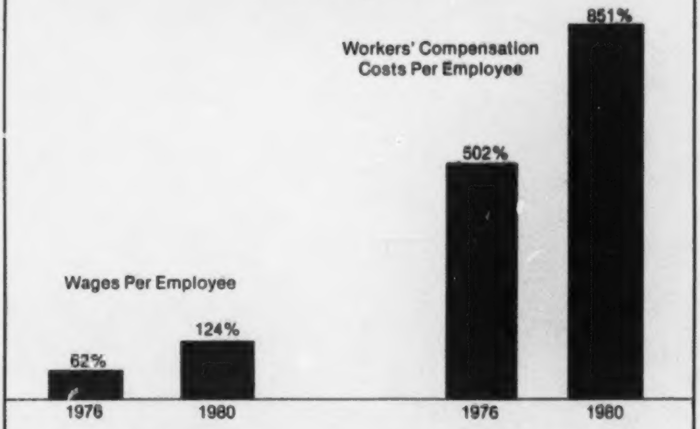
1

A Brief Statement of the Conclusions

1. During the decade of the 1970s, the rate of increase in workers' compensation costs will be six times the rate of increase in payroll.

FIGURE 1.

Increase In Wages Per Employee and Workers' Compensation Costs Per Employee Over 1970 Levels



Source: *1976 figures from Table 4; 1980 workers' compensation figures from Appendix 5; 1980 wage figures derived from 1976 wages using an annual increase of 8.5%.*

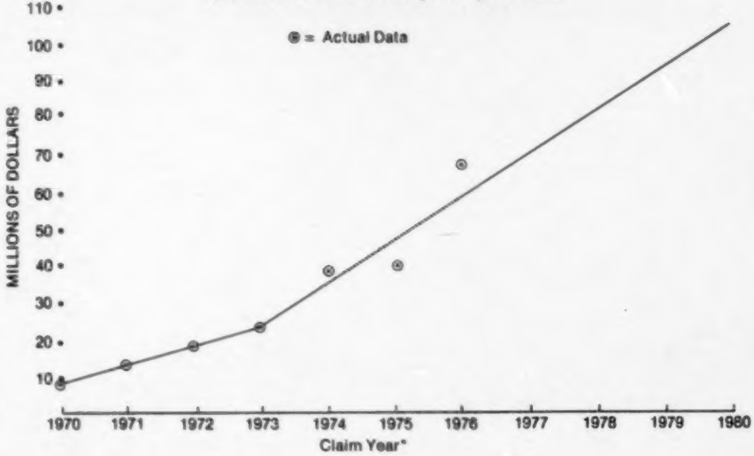
In 1980, workers' compensation benefits are expected to average $1,122 per employee, an increase of 851% over 1970. In 1980, wages are expected to average $16,471, an increase of 124% over 1970. The increase in workers' compensation costs is many times that expected by Congress when the 1972 amendments were being considered.

2. Beginning with 1973 claims, workers' compensation costs were nearly three times higher than in the period 1970-1972—and were increasing at almost twice the pre-1973 rate.

FIGURE 2.

Industry-Wide Workers' Compensation Costs

(Estimated for the 27 Major Shipbuilders)



Source: Appendix 2

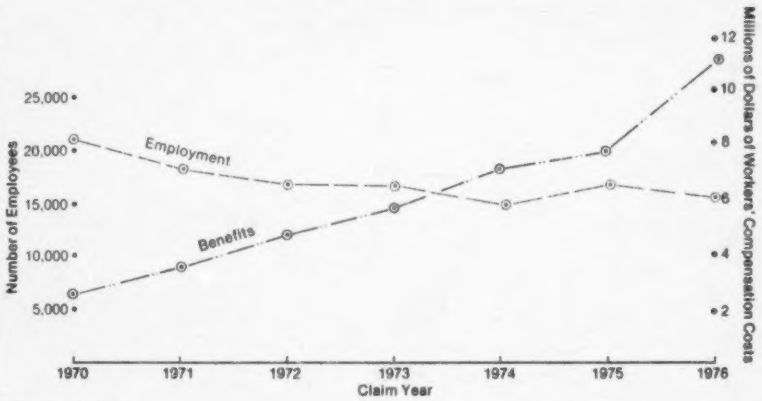
The abrupt upward turn in workers' compensation costs after 1972 is primarily attributable to the 1972 revisions to the LHW Act.

**As used in this report, "claim year" refers to the year of the occurrence which gave rise to the claim.*

3. The liberality of the LHW Act—compounded by the confusion surrounding its administration—is an invitation to misuse of benefits. When employment is high, workers' compensation costs drop; when employment dwindles, claims—and benefit costs— increase sharply.

FIGURE 3.

Shipyard Employment and Workers' Compensation Costs



Source: Table 6

This pattern suggests that employees are deliberately misusing the LHW Act to provide a distorted form of unemployment insurance.

NOTES:

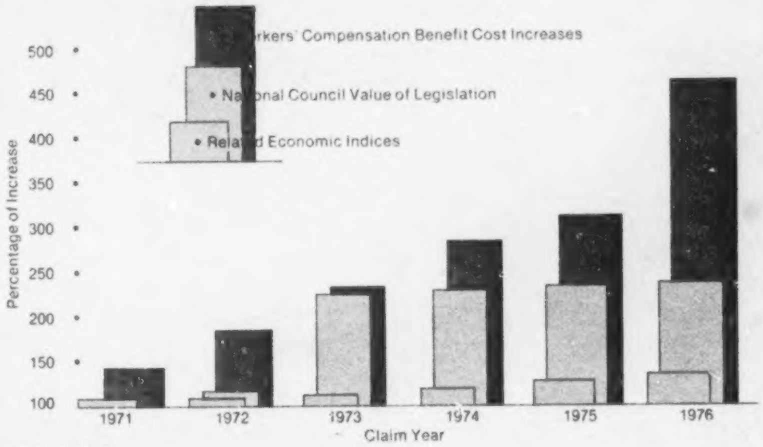
1) Before 1973, some shipbuilding employees were covered by state workers' compensation laws, while others were covered under federal provisions; after 1972, all were covered by the LHW Act.

2) In the pre-1973 period charted, employment was trending downward fairly sharply; at the same time, workers' compensation benefits were rising fairly gradually. Beginning with 1973, employment leveled off somewhat—and workers' compensation benefits began to soar.

4. LHW Act benefit increases have far outpaced the growth of related economic indices—and have been considerably larger than Congress anticipated when the law was enacted.

FIGURE 4.

Workers' Compensation and Related Items Compared to 1970



Source: Table 7

It is evident that the administration of LHW Act benefits is far more expensive than Congress anticipated in 1972.

2

The Data Forming the Basis of the Report

TN&W has used data supplied by members of the SCA. The data were not audited, because such an audit would have been beyond the scope of this study.

Some data were gathered by SCA members in response to data requests designed by TN&W. Other data were gathered by SCA members for earlier studies, or drawn from insurance industry sources or United States Government agencies.

TN&W makes no guarantee as to the accuracy of the data used in this study, but we do believe that they are properly assembled.

Most of the analysis in this report is based on combined indemnity and medical payments for claims with $5,000 or more of indemnity. When other SCA member data are presented, the exception is noted.

Data drawn from self-insured SCA members were divided into two categories, with further divisions of each:

1. Fiscal data from general ledger worksheets:
   - Calendar-year claim payments
   - Calendar-year claims incurred
   - Number of new claims
   - Number of "production and maintenance" employees
   - Payrolls for "production and maintenance" employees
2. Claim detail from individual claim files:
   - Occurrence date
   - Closing date
   - Jurisdiction (federal or state)
   - Claim payments by calendar year
   - Estimates of unpaid liabilities

Claim payments and reserves list indemnity payments and medical payments separately. Claims of the last seven years are subdivided into three categories: fatal, permanent and total disability, and other compensable cases of $5,000 or more.

To the extent possible, TN&W conclusions are based on *payments* rather than on estimates of unpaid liability. Restricting the data base to paid items removes the subjectivity inherent in estimates which result from differing corporate philosophies.

TABLE 1.

Fiscal Year	Number of Production and Maintenance Employees	Production and Maintenance Payroll (000)	Workers' Compensation Benefits Paid (000)	Number of New Cases
(1)	(2)	(3)	(4)	(5)
1970	20,595	$151,711	$2,025	3,338
1971	18,446	145,436	2,169	3,165
1972	17,417	146,930	2,284	3,298
1973	17,380	158,345	2,999	3,051
1974	15,324	160,384	4,181	2,761
1975	17,086	184,032	6,211	3,360
1976	15,872	189,486	7,309	4,884

Source: Shipbuilders Council of America

The figures in Column (2) represent the full complement of production and maintenance employees of the five shipyards which participated in this survey.

The figures in Column (4) represent all payments made in a particular fiscal year for claims which occurred in that year and in earlier years.

TABLE 2.

All Reported Cases

SCA Data

Claim Year	Number of Claims	Claim Payments to 12/31/76	Claim Year Age in Months @12/31/76
(1)	(2)	(3)	(4)
1970	59	$ 776,195	84
1971	63	828,264	72
1972	95	1,157,335	60
1973	141	1,596,951	48
1974	199	1,808,588	36
1975	148	1,187,051	24
1976	147	541,114	12
7 years	852	$7,895,498	

The paid data were arranged by year of occurrence in order to study payment patterns for fixed bodies of claims. These fixed bodies of claims are termed "claim years"; thus all claims occurring in 1970 are combined and are termed "Claim Year 1970."

As a claim year matures—that is, as it gets older—more payments accumulate on those particular claims. Thus the earlier claim years included in the study would have more accumulated payments than would more recent years. By way of illustration: As of December 31, 1976, Claim Year 1975 would be considered 24 months old. On the same date, Claim Year 1976 would be 12 months old. And so on.

The paid data were projected by formulas to 84 months' payout costs for each claim year. As of December 31, 1976, Claim Year 1970 was 84 months mature. Claim Year 1971 was 72 months mature, and was developed to 84 months. Claim Year 1972 was 60 months mature, and was developed to 72 and 84 months, and so forth. Claim Year 1976 was only 12 months mature as of December 31, 1976, and therefore was developed to 24, 36, 48, 60, 72, and 84 months. The data obtained from the participating shipyards, arranged in order of claim year, are shown in Table 2.

Table 3 shows the actual SCA data and TN&W development to a uniform 84 months for each claim year.

TABLE 3.

Dollars of Reported Claim Payments

Actual Data from SCA Participating Members

(Fatal, Permanent and Total Disability, and Other Compensable Cases Combined)

Claim Year	Number of Months Maturity to Each Claim Year						
	12	**24**	**36**	**48**	**60**	**72**	**84**
1970	119,685	305,497	446,394	556,042	622,486	708,058	776,195
1971	233,706	449,196	595,922	694,394	784,760	828,264	
1972	265,052	532,289	815,267	1,001,064	1,157,335		
1973	317,245	836,529	1,206,941	1,596,951			
1974	535,748	1,295,445	1,808,588				
1975	500,560	1,187,051					
1976	541,114						

Developed and Projected Claim Payments

Claim Year	Months of Maturity						
	12	**24**	**36**	**48**	**60**	**72**	**84**
1970	119,685	305,497	446,394	556,042	622,486	708,058	776,195
1971	233,706	449,196	595,922	694,394	784,760	828,264	991,706
1972	265,052	532,289	815,267	1,001,064	1,157,335	1,234,675	1,441,261
1973	317,245	836,529	1,206,941	1,596,951	1,708,121	1,811,197	2,073,834
1974	535,748	1,295,445	1,808,588	2,096,031	2,246,203	2,384,039	2,719,824
1975	500,560	1,187,051	1,896,268	2,284,263	2,487,305	2,672,167	3,103,812
1976	541,114	1,646,287	2,609,329	3,133,838	3,408,585	3,657,167	4,214,917

Source: Shipbuilders Council of America and Tillinghast, Nelson & Warren, Inc.

3

Detailed Report of the Findings

1. The rate of increase in compensation costs (per employee) is several times the increase in payroll.

Over the seven-year period 1970-1976, increases in payroll per employee averaged 8.5% per year; increases in workers' compensation benefits per employee averaged 31.5%. The compounded increase in benefits per employee is 808.5% greater than the compounded increase in payroll (502.1% ÷ 62.1%).

TABLE 4.

Payroll Increases vs. Workers' Compensation Cost Increases

Claim Year (1)	Payroll Per Employee (2)	Compounded Increase (3)	Workers' Compensation Benefits Per Employee (4)	Compounded Increase (5)
1970	$ 7,366	Base	$118.00	Base
1971	7,884	7.0%	186.42	58.0%
1972	8,436	14.5	258.95	119.4
1973	9,111	23.7	318.40	169.8
1974	10,466	42.1	452.72	283.7
1975	10,771	46.2	442.60	275.1
1976	11,938	62.1	710.44	502.1
7-Year Average		8.5%		31.5%

Source:

Column (2): Table 1, Column (3) ÷ Column (2)

Column (4): Appendix 1, Column (10)

2. After 1972, benefits were 256.2% higher than in the period 1970-1972, and were increasing at 165.4% the rate of pre-1973 benefits.

The benefit costs shown on Table 4 were split into two time periods: 1970 through 1972 and 1973 through 1976. A comparison of the two periods shows that the earlier (1970-1972) period was characterized by modest levels and increases, while the later (1973-1976) period was characterized by high levels and large increases. Table 5 is a summary of average cost per employee from Table 4.

TABLE 5.

Workers' Compensation Cost Averages and Increase Rates Before and After the November 1972 Revision

(Average Cost Per Employee)

	Workers' Compensation Benefits Per Employee (1)	Annual Increase In Per-Employee Benefit Cost (2)
1970-1972 Average	$187.79	$ 70.48
1973-1976 Average	481.04	116.60
Percentage Change	256.2%	165.4%

Source: Table 4

3. The liberality of the LHW Act is encouraging misuse of benefits.

When employment is high in the shipyards, LHW Act costs are below average; when employment is low, the costs are above average. This suggests a tendency to misuse LHW Act benefits to provide a distorted form of unemployment insurance. Misuse is common under present-day workers' compensation laws, and appears to have been growing in magnitude since 1972. The phenomenon is best revealed by examining employment levels and workers' compensation costs, as set out in Table 6 below.

TABLE 6.

Employment and Workers' Compensation Costs

SCA Data

Claim Year (1)	Number of Employees (2)	Workers' Compensation Costs (3)
1970	20,595	$ 2,430,210
1971	18,446	3,438,703
1972	17,417	4,510,132
1973	17,380	5,533,792
1974	15,324	6,937,481
1975	17,086	7,562,264
1976	15,872	11,276,104

Source: Appendix 1

There is a very dependable relationship between a *decreasing* workforce and *increasing* benefits. And, when the workforce increases, benefits tend to increase at slower rates. For example, when employment increased in 1975, the increase in benefits was the smallest in the seven-year sample. In contrast, when employment decreased in 1976, benefit estimates rose to record levels. Workers' compensation benefits appear to be misused as a substitute for unemployment benefits.

4. LHW Act benefits have increased far more than have economic indices, and far more than was anticipated by Congress in 1972.

TABLE 7.

Actual Workers' Compensation Cost Increases vs. Anticipated Increases

Claim Year (1)	Cost of Legislation (2)	Increases Due to Cost of Medical Care (3)	Increases in Wages per Employee (4)	Cost Increases from Economic Sources (5)	Actual Workers' Compensation Cost Increases (6)
1970 (base)	100.0%	100.0%	100.0%	100.0%	100.0%
1971	100.0	108.1	107.0	105.1	141.5
1972	116.3	111.1	114.5	107.7	185.6
1973	230.4	114.9	123.7	111.0	227.7
1974	231.2	125.5	142.1	119.1	285.5
1975	235.4	141.8	146.2	127.8	311.2
1976	240.5	158.2	162.1	138.4	464.0

Source:

Column (2): Appendix 3
Column (3): Consumer Price Index, Physicians' Services and Hospital Charges [Appendix 4, Column (9)]
Column (4): Developed from Shipbuilders Council of America data [Table 4, Column (2)]
Column (5): 50% of Column (3) plus 15% of Column (4) plus 35% @ no impact
Column (6): Developed from Appendix 1, Column (9)

The National Council on Compensation Insurance (NCCI) is the source of estimates of the effect of legislation on overall compensation costs. Whenever Congress amends the schedule of benefits or extends the reach of the LHW Act, the NCCI calculates the percentage change occasioned by the amendment. The compound effect of the National Council's estimates is shown in Column (2).

Two Consumer Price Index (CPI) components— "Physicians' Services" and "Hospital Service Charges"— are commonly used to estimate the effects of economic forces on workers' compensation costs between legislated changes. The effect of these two components is shown in Column (3).

LHW Act wage-loss benefits are based on the employee's salary. Therefore, rising per-employee wages also cause LHW Act costs to increase. Column (4) shows the pattern of wage increases.

4

Appendices

Appendix 1

Shipyards have thousands of claims each year; sampling all claims for any particular year would be an onerous (and expensive) task. For this reason, this report is based primarily on data from claims over $5,000 (the only exceptions are a very few death cases and permanent and total disability cases under $5,000).

Table 2 shows the over-$5,000 cases which were included in the sample; Table 1 shows the number of all claims, regardless of size.

All of the claims which were reported have many more years of payments remaining, and that fact must be reflected by increasing the reported values. The unaccounted-for value of these future payments was projected using actual SCA data; these appear, as reported, on the upper portion of Table 3. The lower portion of Table 3 shows the same data after they were "filled out" to a uniform 84 months by TN&W. The 84-month value was then augmented by 25% to reflect all subsequent payments.

It is also necessary to add in the estimated value of unreported claims (those under $5,000). This was accomplished by using claim size distributions in common use in actuarial literature, where it has been shown that claim sizes follow a lognormal pattern.

This Appendix 1 shows the effect of each of the steps necessary to reflect all anticipated benefit costs for the years 1970 through 1976.

Shipbuilders Council of America
Workers' Compensation Benefits to Employees

Claim Year (1)	**Number of Employees (2)**	**Benefits As Reported (3)**	**Factor to Final Settlement (4)**	**Benefit Cost @ Final Settlement (5)**
1970	20,595	$ 776,195	1.250	$ 970,244
1971	18,446	828,264	1.497	1,239,633
1972	17,417	1,157,335	1.557	1,801,576
1973	17,380	1,596,951	1.623	2,592,293
1974	15,324	1,808,588	1.880	3,399,780
1975	17,086	1,187,051	3.268	3,879,765
1976	15,872	541,114	9.737	5,268,646

Claim Year (6)	**Factors from Lognormal to Reflect Claims Under $5,000 (= a) (7)**	$\frac{100}{100 - a}$ **(8)**	**Total Benefits (9)**	**Benefits Per Employee (10)**
1970	60.080	2.505	$ 2,430,210	$118.00
1971	63.951	2.774	3,438,703	186.42
1972	60.048	2.503	4,510,132	258.95
1973	53.162	2.135	5,533,792	318.40
1974	51.004	2.041	6,937,481	452.72
1975	48.692	1.949	7,562,264	442.60
1976	53.271	2.140	11,276,104	710.44

Source:
Column (2): Shipbuilders Sample Data.
Column (3): From SCA reported data, death, permanent and total disability, and claims $5,000 and over.
Column (4): Factor to 84 months development comes from computer aging of data based on older years. Factor from 84 months to ultimate payment comes from other workers' compensation experience.
Column (5): (3) x (4)
Column (7): Based on the lognormal distribution chosen to represent workers' compensation claims sizes.
Column (9): Column (5) x Column (8).
Column (10): Column (9) ÷ Column (2).

Appendix 2
Shipbuilders Council Data and Averages Applied to the Shipbuilding Industry

Claim Year (1)	Benefits per Employee (2)	Shipbuilding Industry Number of Employees (3)	Estimated Benefit Costs for Industry (4)
1970	$118.00	69,202	$ 8,163,836
1971	186.42	67,107	12,510,087
1972	258.95	70,642	18,292,746
1973	318.40	71,456	22,751,590
1974	452.72	85,827	38,855,599
1975	442.60	90,094	39,875,604
1976	710.44	93,291	66,277,658

Source:

Column (2): *Appendix 1, Column (10)*

Column (3): *U. S. Department of Commerce, Maritime Administration; restricted to production and maintenance employees in the 27 major shipyards*

Column (4): *(2) x (3)*

Appendix 3
LHW Act Costs Due to Legislation

Current LHW Act benefits, as written in statute, are estimated to cost 2.405 times more than the 1970 benefits.

Legislative effects are evaluated by the National Council on Compensation Insurance (NCCI), a non-profit organization serving the insurance industry in workers' compensation. Our independent investigation has led us to accept their estimates as respects the impact of legislated benefit changes, starting with the November 1972 Act revision. As average weekly wages increase, the escalation provisions of the LHW Act respond with increased benefits. The NCCI factors include the estimated country-wide increase in benefits caused by the escalation of the average weekly wage. Data calculated by the NCCI are shown below.

Changes in LHW Benefits as Estimated by the National Council on Compensation Insurance

Effective Date of the Change (1)	Total Effect of the Change* (2)	Claim Year (3)	Cumulative Claim Year Indices (4)
		1970	1.000 (base)
		1971	1.000
Nov. 22, 1972	130.5%	1972	1.163
Oct. 1, 1973	-0.2	1973	2.304
Oct. 1, 1974	2.0	1974	2.312
Oct. 1, 1975	1.4	1975	2.354
Oct. 1, 1976	4.3	1976	2.405

**As a percentage of the immediately prior statute.*

Appendix 4
Economic Indices

Workers' compensation costs are highly sensitive to related economic indices, such as wages and medical costs.

Economic factors affecting workers' compensation costs are changes in the payroll of the employees, and inflation in goods and services purchased by claims dollars (such as hospital and physicians' fees, prosthetic devices, rehabilitative services, legal fees, etc.).

a) The effect of changing payrolls among SCA members has been handled in two ways. One, all trends have been calculated after first modifying the SCA data to employment levels of 1976. Two, any escalation of claims due to increases in the average weekly wage has been incorporated in the NCCI evaluation of legislative effects. The first of these, employment levels, is charted in the table below.

In 1976, the number of production and maintenance employees had fallen off to 77% of the 1970 high. This amounted to a loss of 4,723 jobs for SCA members participating in the study. The net result is a 62.1% increase in wages per employee, an average annual increase to the payroll of 8.5% (compounded).

During the same period, production and maintenance gross wages increased by 25%.

SCA Employment and Payroll

Calendar Year (1)	Number of Employees (2)	Gross Wages (000) (3)	Gross Wages Per Employee (4)
1970	20,595	$151,711	$ 7,366
1971	18,446	145,436	7,884
1972	17,417	146,930	8,436
1973	17,380	158,345	9,111
1974	15,324	160,384	10,466
1975	17,086	184,032	10,771
1976	15,872	189,486	11,938

b) The inflation in "Physicians' Services" and "Hospital Service Charges" is a major component in the economics of workers' compensation. The following table displays the average annual Consumer Price Indices (CPIs) for the years 1970 through 1976.

Annual Change in CPI

Year (5)	Physicians' Services (6)	Hospital Service Charges* (7)	Combined CPI Indices (8)	Compound CPI Index (1970 = base) (9)
1970	7.5%	12.5%	8.8%	- -
1971	6.9	11.7	8.1	8.1%
1972	3.1	2.0	2.8	11.1
1973	3.3	3.5	3.4	14.9
1974	9.2	9.0	9.2	25.5
1975	12.3	14.9	13.0	41.8
1976	11.3	12.4	11.6	58.2
7-Year Average	7.3%	8.2%	7.5%	

*The Hospital Service Charge Index was redefined in January 1972. Some of the uneven pattern may be due to that change.

Appendix 5
Industry Workers' Compensation Act Costs

Claim Year (1)	Actual Benefits Per Employee (2)	Linearly Smoothed Benefits (3)
1970	$118.00	$ 117.32
1971	186.42	187.79
1972	258.96	258.27
1973	318.40	306.14
1974	452.72	422.74
1975	442.60	539.34
1976	710.44	655.94
1977		772.54
1978		889.14
1979		1,005.74
1980		1,122.34

The trends are calculated in three groups of years:

- 1970 through 1972, to reflect the years before the LHW Act revision;
- 1973 through 1976, which covers the period after the 1972 LHW Act revision for which SCA data are available;
- 1977 through 1980, to separately show these years as having been derived via extrapolation of the 1973-through-1976 data.

The first two periods clearly are affected by different conditions. Least-squares linear analysis was used to determine the trend underlying each segment.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY

COST OF WORKERS' COMPENSATION
1970 - 1981

	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	Estimate 1981
State Claims	$169,872	$148,741	$ 168,038	$ 202,077	$ 355,226	$ 485,052	$ 637,256	$ 913,375	$ 713,792	$ 365,606	$ 266,713	$ 300,000
Federal Claims	185,444	136,817	145,715	237,170	376,946	505,974	1,239,572	1,976,760	5,367,184	8,217,674	13,231,204	13,700,000
Excess Workers' Compensation Premiums	22,549	22,585	62,117	7,716	69,460	87,725	194,444	-	-	-	-	-
Virginia Tax for Self Insurance	6,884	7,185	14,950	17,230	9,197	10,693	11,669	6,397	7,271	6,124	4,981	5,000
Assessment Under Longshoremen's and Harbor Workers Act	-	-	-	10,330	17,905	21,209	19,142	39,483	54,147	210,314	288,178	350,000
Workers' Compensation Administration	-	-	-	-	-	-	-	-	-	-	89,374	600,000
TOTAL	$384,749	$315,328	$ 390,820	$ 474,523	$ 828,734	$1,110,653	$2,102,083	$2,936,015	$ 6,142,394	$ 8,799,718	$13,880,450	$14,955,000
CUMULATIVE TOTAL	$384,749	$700,077	$1,090,897	$1,565,420	$2,394,154	$3,504,807	$5,606,890	$8,542,905	$14,685,299	$23,485,017	$37,365,467	$52,320,467
Government %	90%	86%	93%	94%	84%	72%	72%	69%	68%	74%	76%	80%
Amount Allocated to Government Contracts	$346,274	$271,182	$ 363,463	$ 446,052	$ 696,137	$ 799,670	$1,513,500	$2,025,850	$ 4,176,828	$ 6,511,791	$10,549,142	$11,964,000
Roll	18,942	21,475	26,083	26,081	24,046	22,623	23,470	25,409	23,950	22,355	23,031	24,000

EXHIBIT C

ANALYSIS OF
WORKERS' COMPENSATION

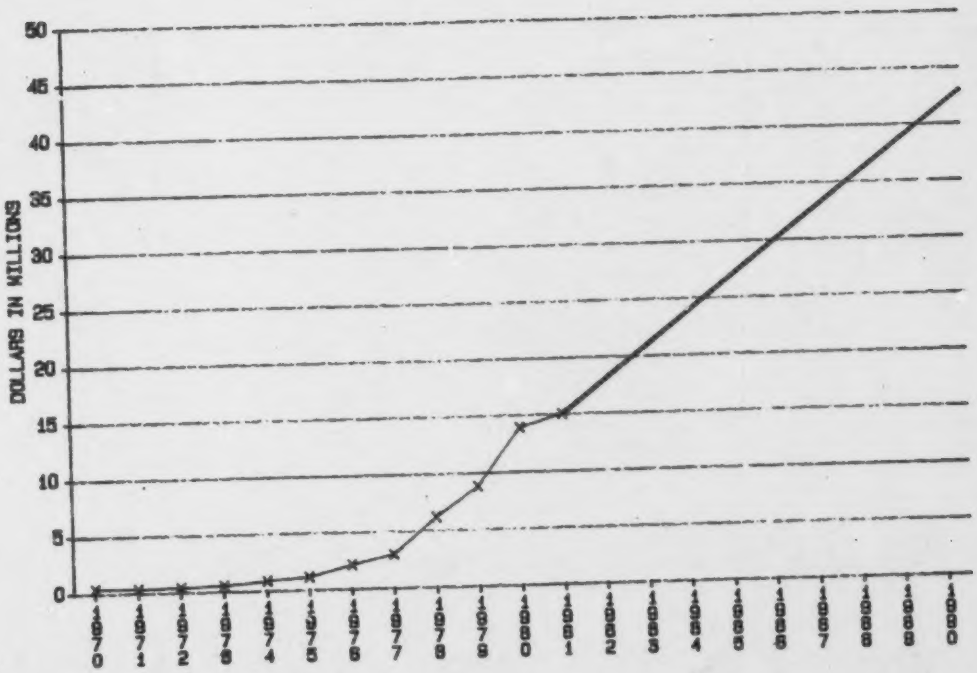


EXHIBIT D

ANALYSIS OF WORKERS' COMPENSATION PER EMPLOYEE

	Average Roll	Workers' Compensation (in Thousands)	W/C Per Empl. (C3 ÷ C2)	Annual % Increase	% Increase From 1972
1970	18942	$ 384.7	$ 20.31		
1971	21475	315.3	14.68	27.7 %	—
1972	26085	390.8	14.98	2.0	—
1973	26081	474.5	18.19	21.4	21.4%
1974	24046	828.7	34.46	89.4	130.0
1975	22623	1110.7	49.10	42.5	227.8
1976	23470	2102.1	89.57	82.4	497.9
1977	25409	2936.0	115.55	29.0	671.4
1978	23950	6142.4	256.47	122.0	1812.1
1979	22355	8799.7	393.63	53.5	2527.7
1980	23031	13880.5	602.69	53.1	3923.3
1981 Est.	24000	14955.0	623.13	3.4	4059.8
1982 Est.	24000	16100	670.33	7.7	4378.2

EXHIBIT E

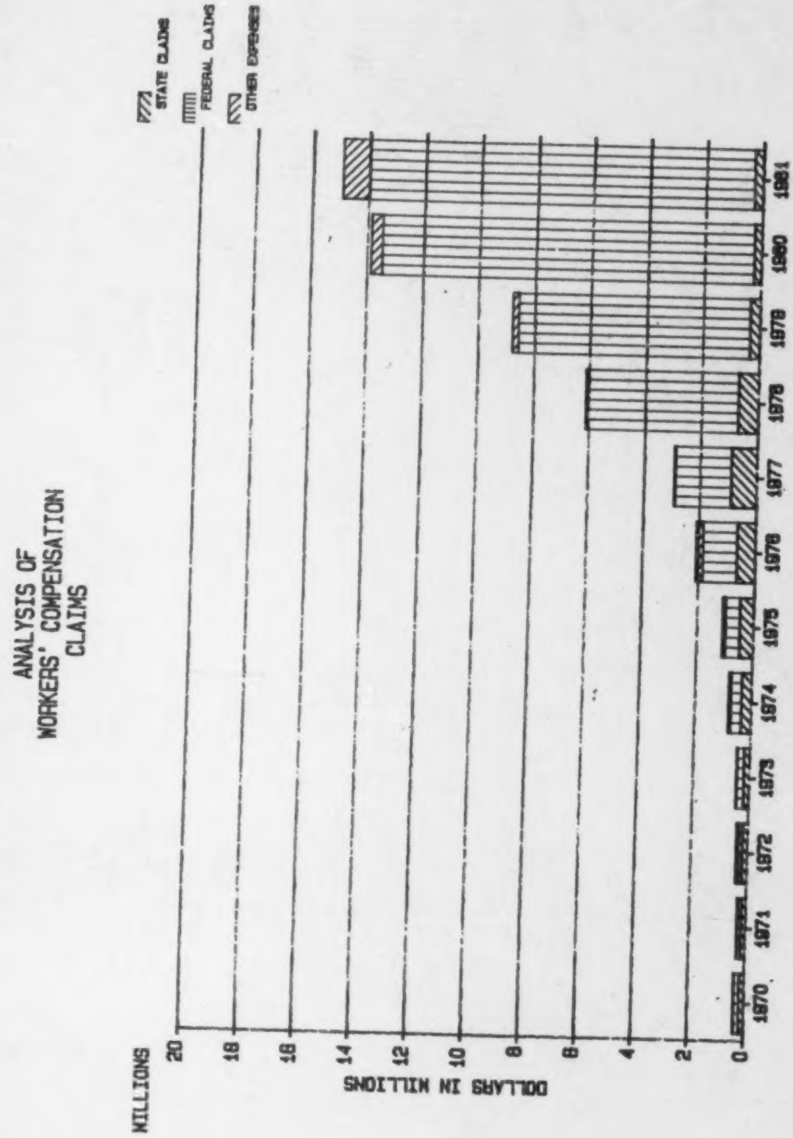

ANALYSIS OF
WORKERS' COMPENSATION
CLAIMS
STATE CLAIMS
FEDERAL CLAIMS
OTHER EXPENSES
MILLIONS
DOLLARS IN MILLIONS
20
18
16
14
12
10
8
6
4
2
0
1970
1971
1972
1973
1974
1975
1976
1977
1978
1979
1980
1981

EXHIBIT F

ANALYSIS OF
WORKERS' COMPENSATION
FEDERAL CLAIMS

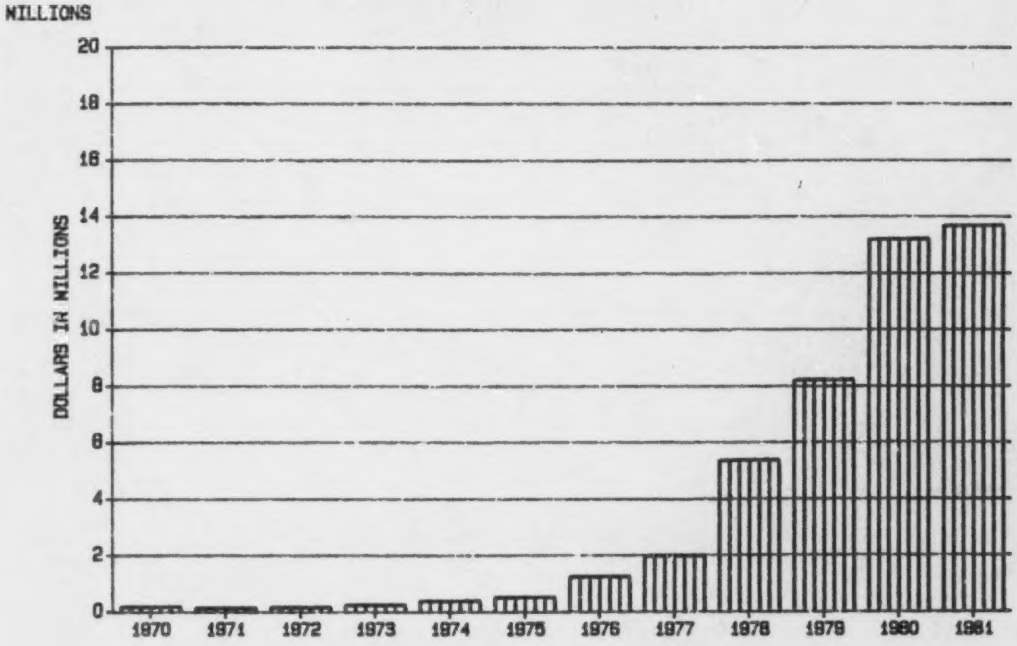


EXHIBIT G

ANALYSIS OF
WORKERS' COMPENSATION
TOTAL CLAIMS

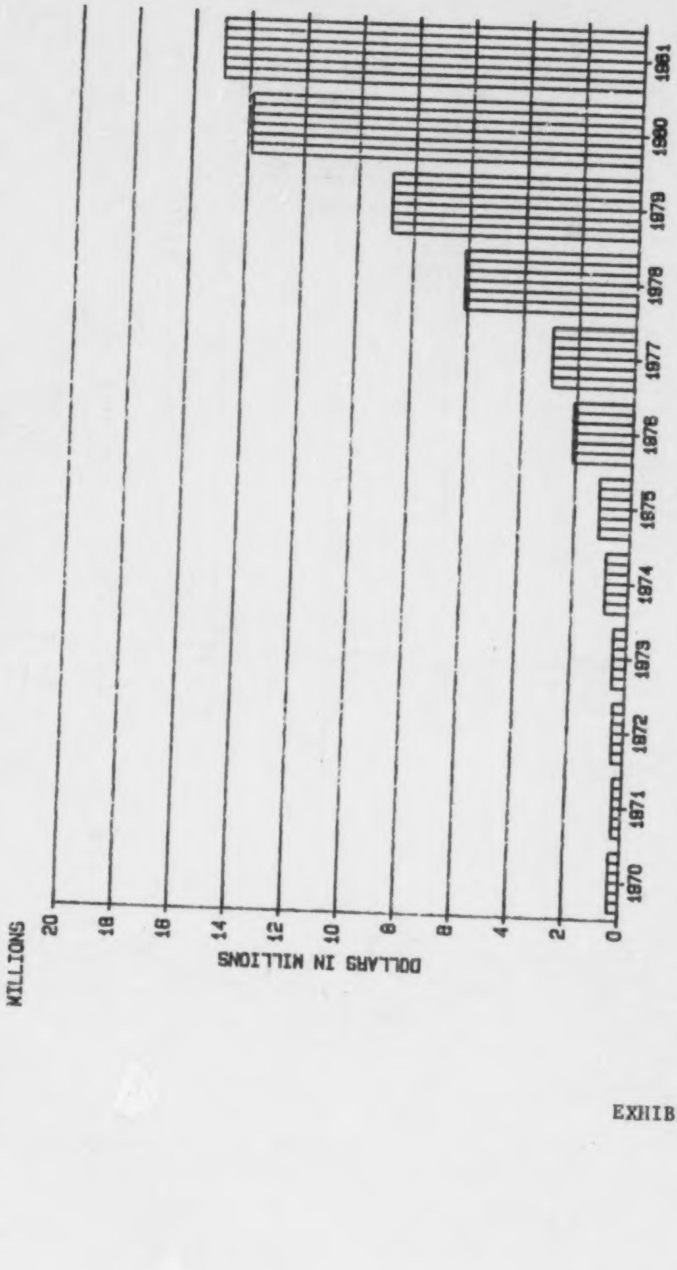


EXHIBIT H

ANALYSIS OF
WORKERS' COMPENSATION
PER EMPLOYEE

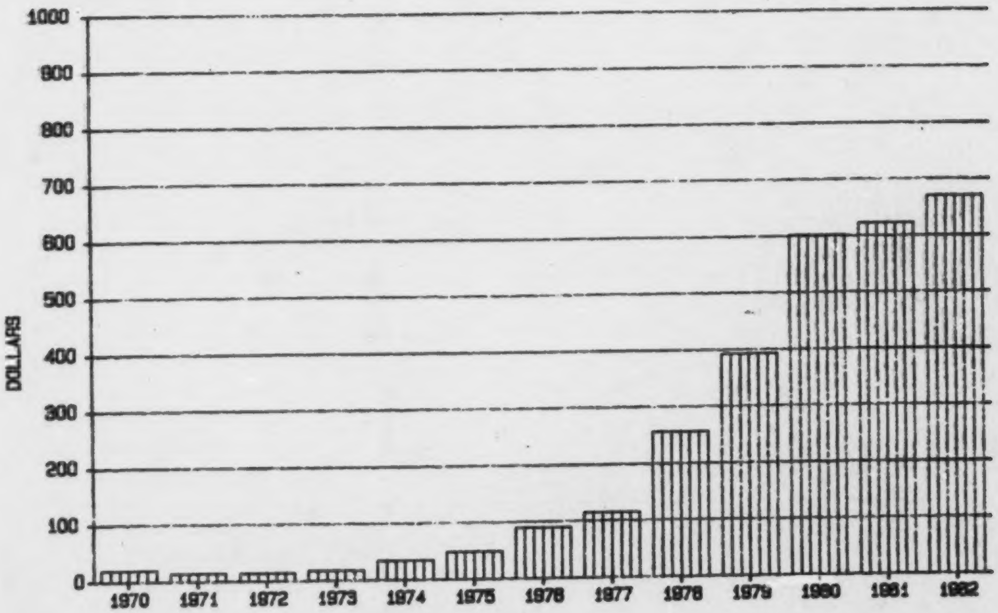


EXHIBIT I

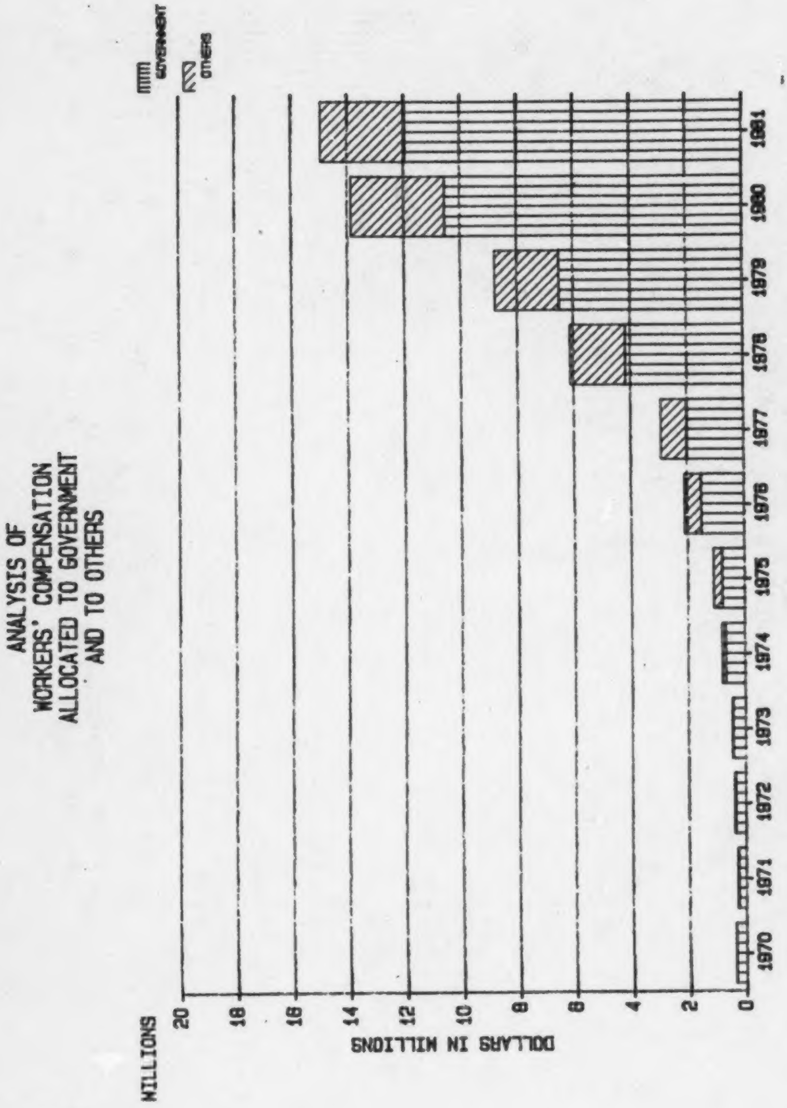

ANALYSIS OF
WORKERS' COMPENSATION
ALLOCATED TO GOVERNMENT
AND TO OTHERS
GOVERNMENT
OTHERS
MILLIONS
DOLLARS IN MILLIONS
0
2
4
6
8
10
12
14
16
18
20
1970
1971
1972
1973
1974
1975
1976
1977
1978
1979
1980
1981

EXHIBIT J

ANALYSIS OF
WORKERS' COMPENSATION
ALLOCATED TO GOVERNMENT

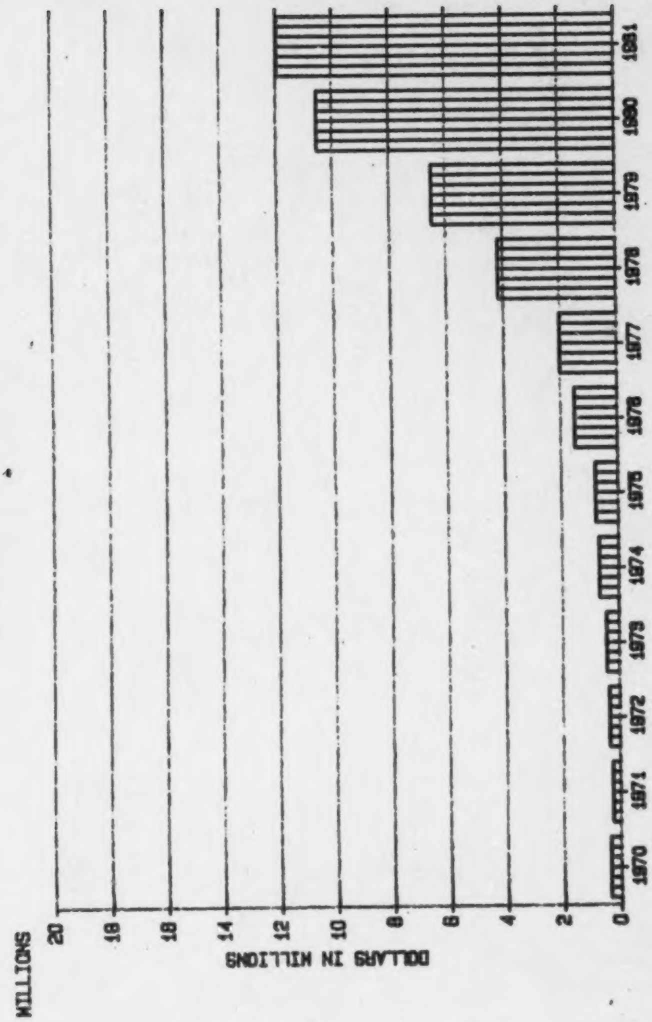


EXHIBIT K

WORKERS' COMPENSATION
611 D (CVN 70 VINSON) SHARE & W/C BURDEN RATE

	TOTAL COMPANY			611 D (CVN 70 VINSON)	
	STR D/L $ (In Thousands)	Workers' Comp.	Ratio (C3 ÷ C2)	STR. D/L $	SHARE OF W.C. (C4) (C5)
1972	$162211.5	$ 390.8	.002409	$ 6.3	15.18
1973	171649.4	474.5	.002764	222.9	616.10
1974	178703.0	828.7	.004637	467.1	2165.94
1975	191710.6	1110.7	.005794	3629.3	21028.16
1976	206901.1	2102.1	.010160	13068.6	132776.98
1977	234175.3	2936.0	.012538	25847.2	324072.19
1978	238582.1	6142.4	.025745	50042.5	1288344.16
1979	216209.7	8799.7	.040700	48996.1	1994141.27
1980	259407.1	13880.5	.053509	56925.6	3046031.93
				Sub-Total	$ 6,809,191.91
1981 Est.	$270000	$14955.0	.055389	$ 44000.0	2437116.00
1982 Est.	297000	16100.0	.054209	4500.0	243940.50
				TOTAL	$ 9490248.41

EXHIBIT L

SULLIVAN & BEAUREGARD
1800 M STREET,
WASHINGTON, D.C. 20036

HENRY G. BEAUREGARD
J. MITCHELL BROWN
STEPHEN B. CLARKSON
ANDREW F. DEMPSEY, JR.*
GEORGE V. GARDNER, P.C.
MATTHEW J. KASTANTIN *
ROBERT SHERIFFS MOSS
LEONARD M. MURPHY *
CARYL A. POTTER, III
JOHN G. ROCOVICH, JR., P.C.
JOHN L. SULLIVAN
DONALD A. TOBIN
NELSON L. BAIN
MICHAEL E. DeBOW
BETH FINEFROCK EMERY
ANTHONY W. PARKER *
MITCHELL H. SEGAL
GERARD J. STIEF

*ALSO ADMITTED IN MARYLAND
*ADMITTED IN MARYLAND ONLY

TELEPHONE
202 861-8000
CABLE: JOHNEL
TELEX: 440229

OF COUNSEL
JOHN COSGROVE McBRIDE

MARYLAND OFFICE
4423 MONTGOMERY AVENUE
BETHESDA, MARYLAND 20814
TELEPHONE 301 656-3802

WILLIAMS, N.J.
1981 OCT -1 PM 5 12

October 1, 1981

BY HAND

Honorable Harrison A. Williams, Jr.
United States Senate
Washington, D.C. 20510

Dear Senator Williams:

Enclosed, pursuant to conversations with Committee Aide Renn Patch explaining the delay in getting this letter back to you, enclosed please find answers to the questions raised in your letter dated August 7, 1981.

Very truly yours,

Stephen B. Clarkson

Stephen B. Clarkson

Enclosure

Answer to Question #1:

There are too many variables to the comparison to establish an answer to this question with any degree of precision. Nevertheless, it is estimated that under Virginia workers compensation the cost would be 35% to 50% lower than under the Federal Act.

Answer to Question #2:

The original estimate set forth in testimony was $14,955,000 (rounded to $15,000,000 in your question). The estimate has been updated and is currently set at $12,380,000. The following chart sets forth the breakdown of both amounts:

	Original Estimate	Revised Estimate
Payments to Workers	$11,650,000	$ 8,625,000
Medical Payments	1,600,000	2,100,000
Legal Fees	700,000	600,000
Administrative Expenses	600,000	600,000
Virginia Tax for Self-Insurance	5,000	5,000
LHWA Assessment	350,000	400,000
Other Items	50,000	50,000
	$14,955,000	$12,380,000

It is not presently anticipated that there will be any addition to reserves in respect of this item in 1981.

Answer to Question #3:

The following figures given are reflective of the years 1970 through 1972 and 1976 through September 21, 1981.*/

Deaths	
Federal	29
State	6
Total	35
Permanent Partial	
Federal	2,835
State	178
Total	3,013

---

*/ The figures for 1973-1975 are not available.

Temporary Total	
Federal	3,979
State	1,148
Total	5,127

Totals of the above categories are:

Federal	6,843
State	1,332
Total	8,175

Answer to Question #4:

The $15 million compensation figure represents 1.5% of Newport News gross revenue. The 1981 gross revenue is estimated to be approximately $1 billion.

Answer to Question #5:

The total contract or target value of Government contracts awarded to Newport News during the period 1973-1980 is approximately $3.4 billion. This includes only major work: shipbuilding, refueling and overhauls, and post shakedown availability work.

Answer to Question #6:

The answers to these questions are not available.

Answer to Question #7:

The contract or target manhours related to Question #5 approximates 163 million. The Company records do not disclose lost time manhours relating to workers' compensation claimants. Since the compensation payments contain death and lump-sum settlements, partial disability payments and other variations, attempts to calculate the manhours would produce invalid and misleading results.

Answer to Question #8:

The contract funds status report prepared as of June 28, 1981 shows that the price of the work performed by Newport News will be approximately $900,832,000. This information is transmitted to the Navy on an on-going basis.

Answer to Question #9:

The contract cost report as of June 28, 1981 shows that the manhours will be 36,452,100. This report is also transmitted to the Navy on an on-going basis. Also see answers to Questions #6 and #7 above.

Answer to Question #10:

The original scheduled delivery date for the CARL VINSON was March 30, 1982. It will be delivered in February 1982.

The contract has not been overrun.

Answer to Question #11:

See answer to Question #1 above.

Answer to Question #12:

See answer to Question #3 above. Not available.

It should be appreciated that the answers set forth above constitute, for the most part, estimates or projections.

Senator NICKLES. Thank you.

Mr. Niles?

Mr. NILES. Thank you, Mr. Chairman.

I am Stewart Niles, and I am a partner in a New Orleans-based law firm. I have represented claimants, self-insured employers, and insurors under the act. For the past 5 years, I have had the pleasure of representing the Shipbuilders' Council as special counsel for longshore problems.

I would like to depart from my written presentation today and address some of the issues and some of the misconceptions presented for your consideration over the past 2 days.

The Workmen's Compensation Committee of the Shipbuilders' Council represents major shipyards throughout the entirety of this country. Two important considerations arise from this. First, these shipyards are virtually self-insured, and the majority of the shipyards are entirely self-insured. Consequently, the economic statistics which Mr. Clarkson has shared with this committee are not a shell-game wherein an insurance company is involved. An argument cannot be made that these costs somehow have been enhanced by pass-through on premium payments or costing for insurance companies. In fact, these statistics do not include the basic necessity for the shipyards to now provide their own claims-handling services, their own adjudicatory process, their own management of claims which insurance companies get paid to do. Our people did not have the expertise, but now they have garnered that expertise and have become premier in the field. As a consequence, they have a unique position and a unique vantage point in commenting on these provisions.

Second, from that vantage point, the Shipbuilders' Council of America endorses S. 1182 in all of its provisions. I say that in summary, because there are other questions and information that I would like to share with the committee in brief today.

In essence, there are two main problems with this act today. It is uninsurable, and it is not affordable. The redress, which you, Mr. Chairman, have proposed hits at those two ultimate problems by looking at the causes and getting to the root of the problem.

First, the annual escalation clause which now fluctuates is unpredictable, and as a consequence, insurance companies will not give us realistic insurance rates. The cap which has been suggested provides the type of predictability which is necessary.

Next, unrelated death—which has never been justified, and which, as Senator Williams pointed out, was hammered out in some negotiations which I have consistently referred to as midnight bargaining sessions—was something that was tacked on even after the midnight bargaining session came into place. This misguided provision appeared on the bill the morning that it was passed, and no one to this date can explain how it got there. There has been no justification for it. There is nothing in the record to support it, and there never has been a commentator, a theorist, a scholar, or a learned person who has given any support to this type of life insurance theory in the sphere of workmen's compensation. In essence, it is unpredictable, because it is the stinger at the end of a workmen's compensation claim, and you cannot predict today what may happen 10, 15 years from now.

The cap which has been proposed as a limit on death benefits further identifies that the midnight sessions developed vague, obtuse language which was latent with all sorts of legal problems. The Department of Labor even admitted before the U.S. Supreme Court that it was an oversight, as an explanation for the deletion of a cap on death benefits in the 1972 legislation.

The expansive determinations given by the Benefits Review Board for tests such as permanent total disability and 8(c)(21) also show that those areas need to be tightened up, as has been suggested by you, Mr. Chairman.

Now, contrary to what you have heard today, Mr. Chairman, shipbuilders were not involved in those bargaining sessions in 1972. If your staff and this committee staff will look at all the hearings which commenced from 1977 to the present, you will find numerous persons who were there in 1972. They say unequivocally—including former Assistant Secretary of Labor, Mr. Ellsberg—

> I was there, and I can confirm to this committee that shipbuilders were not present, they were not involved, they did not bargain, and those issues were not before us at any time whatsoever.

So when other spokesmen today have represented to this committee that there was an historic bargain struck on third party liability, that is entirely incorrect, because shipyards were not there.

As a matter of fact, because shipyards were not there, two very important things happened. First of all, the jurisdiction issue got so screwed up that the only way to put it back in good working order is for the Congress to adopt your recommendation, Mr. Chairman, which is to do what the U.S. Supreme Court did in 1970. And, contrary to what Senator Williams advised the committee, if you look at Gilmore and Black and other commentators, you will find that after the Calbeck decision in 1960, the theorists and the scholars all agreed that although it was an act of judicial legerdemain, the U.S. Supreme Court gave a clear line of demarcation in shipyards. That clear line of demarcation was the water's edge, because before 1960, only one class of shipyard worker was covered under the act, and that was ship repairmen. Shipyard workers engaged in new construction over navigable water were not covered; only ship repairmen over navigable water were covered before 1960. So this is not something that has had a long historical development.

I might also note, in clarifying one or two other points, that the specter of the curse of the third party problem as has been identified by Senator Williams may be eliminated for the stevedoring industry, but it is one of the biggest problems confronting the shipbuilding industry today. Under section 905(b), as it was amended in 1972, there is now a new species of tort, and that new species of tort applies not only to vessels which have been completed, but in light of some interpretation again of vague language developed in 1972, the courts have said 905(b) tort actions can be extended to hunks of steel that are not vessels. This result is directly contrary to traditional maritime thought, and it is an extension of maritime law into areas which have never heretofore been extended.

We have the curse of third party liability today, Mr. Williams, under section 905(b), and the reason is that shipyards were not involved, as you know, with regard to the compromises that were hammered out in those midnight sessions between stevedores, longshoremen, shipowners, the Department of Labor, and members of the House and Senate staff, because shipbuilders were not there.

As a matter of fact, the examples justifying change that have been given, even to the present, do not include examples of jurisdictional problems for shipbuilders. Examples that have been provided were two men walking up a plank, loading and unloading the ship; one man falling on the vessel and one man falling onto the land. That is not a shipbuilding process. The point of fact, there has been no focus on shipbuilding problems pursuant to the Longshore Act. We have been orphaned in under this act, we have been discriminated against, we do not belong here, and we should be relieved from the burdens of this particular act, particularly for the reasons that we have identified, both practically, economically, as well as from the legal standpoint.

Now, an adverse comment was made that the Longshore Act amendments would throw this law back to the States. The Longshore Act was premised upon the New York statute. The Longshore Act was developed from State statutes. Remember, today we are talking about a situation where the tail is attempting to wag the dog. In 1917, the U.S. Supreme Court said longshoremen over water cannot be covered by State compensation. Congress twice then tried to empower the States to cover those individuals under State compensation statutes. Twice, the U.S. Supreme Court struck such congressional action down as unconstitutional.

In 1927, the act was enacted by the Congress, and at that time, only longshoremen over water were covered, and only ship repairers injured over navigable water were covered. The reason was that the act was intended to fill only the gap, the hole, that was heretofore created by the Supreme Court interpretation.

Today, the thought is presented to this committee, that although State compensation jurisdiction applies, although it is most appropriate to the marketplace at that geographic point, although the amount of compensation is geared to the purchase of services and goods in that particular State, is geared to the wages for that particular State, and is geared to what all other workers in that particular State are receiving, that there should now be a privileged class who, because of a bootstrap argument that because certain, limited people had to be covered over water, should be covered over land.

This committee has heard today from longshoremen and shipbuilders that the operations are primarily over land. The numbers of individuals who are covered and exposed to the problems over water are very slight, indeed. Now, I know I am going close to my time limit. I hope I have time to discuss the overlays we have provided, both individually, and with the large overlays, to further amplify these problems.

One or two quick points. It was noted this morning that the jurisdiction issue as presented in this bill would keep compensation lawyers in high clover for a long time. I respectfully disagree for this reason. We had in 1960 a very clear way to take care of this. It was called election of remedies. An election of remedies provided, Mr. Chairman, the right of the employee to select. If he had been on the boat at 10 o'clock, and he had been on land at 2 o'clock, and he left work at 4 o'clock because of aggravation of an injury, he filed either a longshore claim or a State workmen's compensation claim. It was his election, and the employer did not impinge upon that election. The worker was given the right to elect either remedy. That is where the right should be.

Today, we have concurrent jurisdiction, and shipyards meet State compensation claims and longshore worker compensation claims in virtually all instances. It is not unusual for me to try a longshore claim in the same week that I try the same claim before a State court judge, on the same claimant—different jurisdiction, same act.

Now, there was some confusion about stacking and pyramiding. The Longshore Act will provide a credit for disability benefits provided pursuant to the State act, but it is not a full credit. The method workmen's compensation is characterized under the State law, one does not get a full credit for the Longshore Act. Next of all, the way the situation is set up now, since the employees can get both State and Federal jurisdiction, the employee can go to the State act and say, "I want benefits 1, 4, and 7," and then go to the Longshore Act and say, "I want benefits 2, 11, and 12."

And as a consequence of combining the two acts, there has been this amorphous creature which burdens the employer and multiplies the burdens well beyond what either State or Federal ever intended, because you have a mutant creature. You have a mutant compensation system.

The other point is that you cannot stack these systems because State and Federal systems have many different provisions. Some States have mandatory rehabilitation; the Longshore Act does not.

Some States provide different types of benefits that the Longshore Act does not. There is no way that you can stack them. Some States even allow a tort remedy, so that in some States, workers desire to pursue their State-provided tort remedy, in addition to compensation, and forgo the Longshore Act. This is very common, also. We have seen this in our committee, reports of this, repeatedly.

Senator WILLIAMS. In what States? Do you have that?

Mr. NILES. Yes, sir. Louisiana, for one. I can speak with individual experience for Louisiana, and I can also speak from experience in States such as Alabama, and there appears to be a trend in Mississippi in that same regard, because of the Supreme Court's development in those States of an executive officer or coemployee theory. We will be glad to supply that to the committee's attention.

Senator NICKLES. We are going to need to move on.

Mr. NILES. Yes, Mr. Chairman, and I do apologize for the inordinate amount of time.

I would note that we have attempted in our written presentations to combine the foremost knowledge developed over the past 5 years and to present to the committee in a very technical and meaningful way the practical reasons why this act should be amended.

Heretofore, opponents to this bill, we suggest, have not come forth with any constructive criticism. If there is concern about the worker, why doesn't someone stand up and say, "We stand behind the concept of rehabilitation, we stand behind the concept of medical, we stand behind a number of the concepts which are currently incorporated in this act."

We applaud the bill. We commend the efforts of the chairman and Senator Nunn, and we suggest that the Members of the House and the Senate on the floor should openly debate the issues presented herein in order that there can be an ultimate resolution.

We believe that this bill strikes a reasonable balance and the best analysis of the competing and conflicting problems, and we think that it will bring balance and harmony to a situation whereby an employer can provide affordable insurance benefits in a system that delivers quick and reasonable benefits to the injured workers.

Mr. Chairman, thank you very much. I hope I can answer some questions, particularly on the overlays and the jurisdiction issues.

Thank you.

[The prepared statement of Mr. Niles follows:]

STATEMENT OF STEWART E. NILES, JR.

SPECIAL COUNSEL FOR THE SHIPBUILDERS COUNCIL OF AMERICA

SUBCOMMITTEE ON LABOR OF THE
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

HEARINGS ON S. 1182

UNITED STATES LONGSHOREMEN'S AND HARBOR WORKERS'

COMPENSATION ACT

WASHINGTON, D.C.

JUNE 17, 1981

INDEX

PAGE

I. Introduction 1

II. The 1972 Amendments have Transformed the Longshoremen's and Harbor Workers' Compensation Act from the Traditional Workers' Compensation into Social Welfare Insurance 2

- A. The Act has Become a Retirement Program 2
    - 1. Benefits are paid during the recipient's lifetime, not a recipient's work life expectancy 3
    - 2. Benefits are not awarded as a wage replacement system 5
    - 3. The Act does not contain incentive for an employee to return to work 6
    - 4. The Act does not contain incentives for an injured employee to participate in rehabilitation 7
- B. The Act Contains a Life Insurance Program which is Contrary to Traditional Workers' Compensation Concepts 8

III. Shipyards are Virtually unable to Obtain Insurance for Longshoremen's and Harbor Workers' Compensation Insurance. Shipyards have been Forced to Perform the Function of Insurance Companies to Stay in Business 8

- A. Annual Escalation Clause 10
- B. Benefits for Death Unrelated to Employment 11
- C. The Statute does not Specify a Limitation on Death Benefits 12
- D. The Benefits Review Board has Expanded the Test for Permanent and Total Disability 12

IV. New Species of Tort in Shipyards 14

V. Shoreside Extension of Shipyards in the 1972 Amendments to the Act was Included Through Oversight 16

- A. Shipyards were "Orphaned" into the Longshoremen's and Harbor Workers' Compensation Act 17
- B. Longshoremen Sought Change in Jurisdiction and Coverage 20
- C. Shipyards Included in 1972 Jurisdiction Amendments through Oversight 23
- D. Shipyards are Indistinguishable from other Industrial and Fabricating Plants 25

VI. The Remedy: S. 1182 28

- A. Jurisdiction 28
- B. Annual Escalation Clause 29
- C. Permanent Total Disability 29
- D. Loss of Wage-Earning Capacity 30
- E. Maximum Limitation for Death Benefits 30
- F. Unrelated Death Benefits 31
- G. Spendable Earnings as a Basis for Maximum Weekly Benefit 32
- H. Medical Care 32
- I. Independent Medical Examination 33
- J. Settlements 34
- K. Notice 34
- L. Coordination of Benefits 36

VIII Conclusion 36

STATEMENT OF STEWART E. NILES, JR.
SPECIAL COUNSEL FOR SHIPBUILDERS COUNCIL OF AMERICA

Mr. Chairman, members of the Committee:

I.

Introduction

My name is Stewart E. Niles, Jr. I am a partner in the New Orleans, Louisiana, law firm of Jones, Walker, Waechter, Poitevent, Carrere & Denegre. My practice primarily embraces personal injury litigation, including workers' compensation laws under state and federal statutes. In the area of workers' compensation, I have represented claimants, self-insured employers and insurance companies. Since 1976, I have served as special counsel to the Shipbuilders Council of America for matters concerning the Longshoremen's and Harbor Workers' Compensation Act. It is a privilege to again appear before the Committee.

The shipbuilding and ship repair industry endorses S. 1182 introduced by Senator Nickles. These Amendments will strike a balance between the need to compensate an injured worker and the need to provide workers' compesation insurance which is predictable and affordable. Currently, shipyards are confronted with havoc when attempting to obtain insurance coverage for Longshoremen's and Harbor Workers' Compensation Act (the Act) claims. Shipyards have been compelled to establish and maintain self-insurance programs, in many instances with insurance coverage in excess of $1,000,000 per claim. Management of self-insurance programs has confirmed that the ultimate cost of a claim is unpredictable. The cost of the workers' compensation program is reaching the limits of affordability, and, yet, costs continue to escalate at an unlimited pace.

These factors combine to create problems with catastrophic tendencies for the shipbuilding and ship repair industry in the United States.

The following discussion reviews the major, statutory problems besetting the Act. Sections II-V analyze the Act's deviation from Workers' Compensation redress, prevention of affordable insurance, development of a new tort remedy, and creation of inesolvable jurisdictional problems. Section VI relates the remedies provided by S. 1182 and confirms that these remedies will effectuate a cure for the statutory deficiencies.

II.

The 1972 Amendments Have Transformed The Longshoremen's and Harbor Workers' Compensation Act From The Traditional Workers' Compensation Into Social Welfare Insurance

As amended, the Act disavows basic workers' compensation trade-offs. Employers abandon defenses of contributory negligence, comparative negligence, and assumption of risk in return for which employees abandon tort-type recovery. The 1972 Amendments not only guarantee benefits comparable to tort recovery for most injuries, but extend further to provide social welfare insurance.

A. The Act Has Become A Retirement Program

Several criteria contribute to the Act becoming a "retirement program", namely:

1. Benefits are paid during the recipient's lifetime, not a recipient's work life expenctancy;
2. Benefits are not awarded as a wage replacement system;
3. The Act does not contain incentive for an injured employee to return to work;
4. The Act does not contain incentive for an injured employee to participate in rehabilitation.

1. Benefits are paid during the recipient's lifetime, not a recipient's work life expectancy.

Compensation for permanent total disability and unscheduled permanent partial disability for loss of wage earning capacity do not terminate at an employee's retirement age. Permanent total disability is paid at the rate of two-thirds of the worker's average weekly wages "during the continuance of such total disability".[1] Unscheduled permanent partial disability or loss of wage-earning capacity is paid at the rate of two-thirds of the difference between the worker's average weekly wage at the time of the accident and his post-accident wage-earning capacity.[2]

Since benefits continue past work expectancy, compensation claims for benefits by workers approaching mandatory retirement age are prevalent. Degenerative diseases, primarily heart diseases, strokes, arthritis, asthma, or high blood pressure, may force early retirement. Since these degenerative diseases develop over a long period of time, the worker seeks ways to retire. This Act fulfills that desire. It is possible for a worker to retire from a degenerative disease, to file a claim for compensation, and to receive lifetime compensation.

---

[1] 33 U.S.C.A. §908(A)

[2] 33 U.S.C.A. §908(C)(21)

The lessened productivity of a worker beyond work life expectancy is not taken into account. Again, positive incentive is provided for the worker to cease any type of employment. For example, an injured workman received benefits for 24% permanent partial disability to his leg. However, an Administrative Law Judge awarded permanent and total disability benefits because the employee was 69 years old. Obviously, if the employee's age was not the controlling factor, the employee would have received benefits for permanent partial disability directly related to his injury. Because the employer attempted to engage the employee in gainful employment beyond his work life expectancy, the employer was ultimately penalized. The employee used his injury to retire, and he was assisted by the Act.

Payment of benefits beyond work life expectancy creates a dichotomy. Social Security retirement benefits and Longshoremen's and Harbor Workers' benefits are opposing theories. These philosophies collide to provide a windfall for the employee. An employee may receive compensation benefits, Social Security benefits, and pension benefits from an employer-funded plan without any limitation or a coordination of these benefits. Thus, the employee can receive 125%, 150% or more of net take home pay.

With unrestricted receipt of such benefits, an employee can receive a guarantee of more in total benefits than he might receive in any possible claim for unlimited negligence benefits.

To alleviate this unjustifiable burden on the employer, action could be undertaken to

1. Terminate all compensation benefits at retirement age and
2. Coordinate all compensation, retirement, or social benefits to achieve a fair balance of the total payment.

2. Benefits are not awarded as a wage replacement system.

The entire concept of workmen's compensation is premised on a wage replacement system. The Act, in its present form, transcends the wage replacement concept and creates a retirement plan.

The Benefits Review Board interpretation and application of unscheduled permanent partial disability benefits has created positive incentive for a retirement system. The Benefits Review Board, contrary to prior jurisprudence and Congressional intent, has decided that the scheduled benefits of §8(c)(1-20) are not exclusive and that each claimant can seek a loss of wage-earning capacity. The Benefits Review Board interpretation is contrary to the specific language of §910(h). Since actual wages are not a dispositive factor, an employee may receive an award for loss of wage-earning capacity while he is gainfully employed earning wages equal to or greateer than those at the time of the accident. The resultant effect is that during the pendency of a claim for compensation, it is more advantageous for an employee to "retire" from any type of employment. After the employee has obtained an award for total and permanent disability or unscheduled permanent partial disability for loss of wage-earning capacity, the employee can obtain other employment without a reduction in benefits.

Although the U.S. Supreme Court has recently overruled the Benefits Review Board's interpretation, Potomac Elec. Power Co. v. Director, 101 S. Ct. 509 (1980), the Act should be amended to provide for loss of wage-earning capacity to be based on actual loss of wages. Additionally, the Act should automatically reduce compensation benefits for permanent total disability and unscheduled permanent partial disability by amounts actually earned. The Potomac Elec. Power Co., supra, decision highlights the bizarre results which have resulted from the Benefits Review Board's interpretation of vague and inconsistent statutory provisions. S. 1182 will remove this possibility.

3. The Act does not contain incentive for an employee to return to work.

Frequently, an injured workman receives compensation benefits and Social Security benefits or payments from employer-funded pension plans and other retirement sources. Receipt of these benefits will exceed net take home pay. Unless these multiple benefits are coordinated to provide a total of two-thirds of average weekly wages, the frequency of claims and the extent of alleged disability will continue to rise. Employers are constantly confronted by employees who blatantly declare that they will "never return to work" - although physically capable of employment. Consider, for example, the employee earning $8.12 per hour or $324.80 for forty hours. With a family of four, state tax is $6.80 (depending on the state), federal tax is $44.60 (assumed), S.D.I. $3.26, F.I.C.A. $19.09, union dues $2.50 and net take home pay is $250.15. The compensation rate is $217.60. The employee does not have the expense of travel to and from work, lunch, or clothes. Thus, there is no incentive to return to work for an additional $32.55 per week or $.81 per hour, especially when the choice is to stay at home.

Positive incentive for return to work must be erected. Benefits from all sources must be coordinated to assure work incentive is supported.

4. The Act does not contain incentives for an injured employee to participate in rehabilitiation.

The Act does not contain any incentive for rehabilitation. A claimant seeking workmen's compensation benefits is not required to enroll or participate in a rehabilitation program. Absent mandatory rehabilitation, under certain conditions, or incentive for rehabilitation, an employee's attempt to retire on workmen's compensation benefits or an employee's retirement from failure to reach maximum cure is materially assisted.

A rehabilitation program should be established to assure maximal medical recovery of the employee. The program should contain incentive for the employee's enrollment and active participation.

B. The Act Contains a Life Insurance Program Which is Contrary to Traditional Workers' Compensation Concepts

The Act contains a scheme of life insurance providing death benefits from causes unrelated to employment.

The employer becomes a life insurer of the recipients of total disability and loss of wage-earning capacity benefits. In the event a recipient of these benefits dies from any cause, the employer is obligated to pay death benefits. This concept is totally divorced from a worker's compensation scheme. This automatic payout provision can only be viewed as social legislation. If these provisions are not repealed, the cost of such programs should be funded from general appropriations and be paid by the general populace.

III.

Shipyards are Virtually Unable to Obtain Insurance for Longshoremen's and Harbor Workers' Compensation Insurance. Shipyards have been Forced to Perform the Function of Insurance Companies to Stay in Business

Since the enactment of the 1972 Amendments, shipyards have confronted increasingly difficult problems in obtaining insurance for Longshoremen's and Harbor Workers' Compensation Act coverage. Underwriters for insurance companies tell shipyards that the uncertainties created by the 1972 Amendments have forced insurance companies out of the market. Moreover, shipyards have been unable to obtain primary insurance, i.e. insurance coverage which would provide claims handling services, reporting, reserve setting, processing of contested claims, representation in the ad judicatory process. In essence, shipyards have only been able to obtain excess insurance, thereby forcing shipyards to take on the added responsibilities of becoming their own primary insurers.

1. Predictability is the essential basis for insurability and, hence, the fixing of reasonable insurance rates.

This Committee has heard testimony from various maritime interests that the cost of insurance, if available, is prohibitive. Decisive steps must be undertaken to assure the availability and the reasonable pricing of insurance coverage. Of necessity, compensation insurance is "an integral part of the whole scheme."[3]

2. The obligations of the Act must be made predictable to afford a basis for the fixing of reasonable insurance rates.

In the absence of available insurance at reasonable rates, the prospect of several shipyards going out of business is not only probable, but imminent.

---

[3] Arthur Larson, The Law of Workmen's Compensation, Vol. I §2.70 °1972 Ed.1.

The unpredictable provisions created by the 1972 Amendments are several.

A. Annual Escalation Clause

The 1972 Amendments provided that compensation for death or permanent total disability would automatically be increased by the percentage the national average weekly wage increased over the national average weekly wage of the preceding year.[4] The automatic increase in benefits under Section 10(f) is commonly referred to as the annual escalation clause. A similar annual escalation provision was enacted for permanent total disability and death arising prior to the 1972 Amendments.

The automatic escalation clause diminishes the impact of inflation on compensation benefits. However, this clause multiplies the compensation costs to shipyards. Actual cases which illustrate the multiplying effect of automatic escalation compensation benefits can spiral to seven or eight times unescalated costs. These statistics are actual cases, not projections. As a consequence of the multiplier effect of the automatic escalation clause the total payment is pushed to an exorbitant level.

Moreover, the task of predicting the ultimate costs for permanent total disability claims is further complicated by the fact that a maximum period of payment is not established.

---

[4] 33 U.S.C.A. 910.

Permanent total disability payments are made throughout the lifetime of the disabled worker. Since a specific age or "yardstick" is not established for the termination of permanent total disability benefits, the maximum number of years of payout cannot be established. Again since a method of accurately calculating the cost of total disability claims cannot be predicted, the basis for insurance coverage cannot be formulated. As long as the Act lacks predictability, it will remain uninsurable.

B. Benefits for Death Unrelated to Employment

Benefits can be paid for an employee's death, even if the death was unrelated to the employment. Recipients of total and permanent disability and loss of wage-earning capacity fall within this category. When death results to these types of injured employees, the employer is automatically required to pay death benefits, although death is unrelated to employment.

For example, survivors are entitled to death benefits if an employee receiving permanent and total disability benefits is killed in an automobile accident, while on vacation, or from whatever cause. Similarly, the survivors of an employee receiving benefits for loss of wage-earning capacity are entitled to make a claim for 150 percent of loss of wage-earning capacity benefits even if the death occurs in the course and scope of the employment for a subsequent employer.

Since every accident is potentially one for total and permanent disability or loss of wage-earning capacity, every lost time accident in the shipyard could fall under the provisions for death benefits from unrelated causes. Again, the underlying point is that if the employer must face this type of claim for every accident, the extent of the insurance obligation cannot be reasonably predicted.

C. The Statute Does Not Specify a Limitation on Death Benefits

The United States Supreme Court has concluded that the amount of weekly death benefits is not subject to the limitations on maximum payable benefits.[5] Since the maximum limitation is inapplicable to death benefits, compensation responsibility is unpredictable.

D. The Benefits Review Board Has Expanded the Test for Permanent and Total Disability

Prior to action by the Benefits Review Board, the United States Court of Appeals uniformly held that an injured employee would receive benefits for a permanent and total disability if he was unable to engage in any type of employment. This classification was reserved for workers who could not engage in any gainful employment and had a total loss of wage-earning capacity.

The Benefits Review Board has changed this classification. An employee may be capable of gainful employment, and may actually be employed, but he may be awarded total and permanent disability benefits. The Benefits Review Board now utilizes a nebulous test to determine whether an employee is totally and permanently disabled. Actual employment does not preclude a finding of permanent and total disability.

---

[5] 33 U.S.C. §906(b)(1).

Under this new theory, greater burden is placed on the employer. The employee may concede, and the BRB may find, that the employee can perform lighter work than that at time of injury, but permanent and total benefits will be awarded unless the employer proves work is available to the employee. The burden is shifted to the employer to find suitable employment and to demonstrate the employee's ability to perform the work--all to which objection is urged by the employee.

Further consider the dilemma of the employer who had an employee return to work for 22 months following an injury, who fired that employee for bringing a gun into the shipyard, and who was sued for permanent and total disability from the date the employee was fired because he could not find a job.

Since an employee receiving total and permanent disability benefits is entitled to an automatic annual escalation of those benefits and since his survivors are automatically entitled to death benefits, even if his death is unrelated to employment, the employer's obligation will be multiplied.

The classification of those entitled for high benefits levels without limitations must be well-defined. In spite of knowing the nature and extent of injury, it is impossible to determine an injury's disability category. As the Act is increasingly applied in expansive terms, the level of magnitude of injury which qualifies for the highest benefits is lessened and lessened.

The Act should be amended to incorporate a specific definition which constitutes total and permanent disability. An employee who is capable of gainful employment or who is actually engaged in gainful employment should not fall within this classification.

VI.

New Species of Tort in Shipyards

It is generally agreed the primary motivating force behind the 1972 Amendments was the elimination of the Sieracki-Ryan doctrine.[6] This doctrine allowed longshoremen to pursue maritime tort actions of unseaworthiness against vessel owners or owners *pro haec vise*.[7] The circle of recovery was completed when the ship owner sought indemnity from the stevedore employer.[8] The resultant effect was to thereby circumvent the exclusivity of the Longshoremen's and Harbor Workers' Compensation Act. Thus, the Sieracki-Ryan type of tort recovery was precluded in return for expanded benefits.[9]

---

[6] Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946); Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956). The employee could sue the vessel for unseaworthiness and the vessel could seek indemnity from the employer-stevedore on the theory it had breached an express or limited warranty of worklike performance to the vessel.

[7] Sieracki, *supra*, note 2. In Reed v. The Yaka, 373 U.S. 410, 83 S.Ct., 1349, 10 L.Ed.2d 448 (1963), the longshoreman was allowed to recover against the ship owner who was also the employer of the injured longshoreman.

Section 905(b)[10] was enacted in 1972 to abolish Sieracki-Ryan liability. However, in light of judicial interpretations of §905(b), the exclusivity of the Act has been eroded. Specifically, shipyards can be sued by their employees in maritime tort for unlimited damages despite receiving the Act's generous benefits.

Section 905(b) has been interpreted to allow recovery by a shipyard employee for maritime negligence against his employer who is also the owner or owner *pro haec vise* of a vessel.[11] To recover, the employee must demonstrate that his employer's negligence was that as ship owner or ship operator, as distinguished from negligence as shipyard employer. One might assume it reasonable to prohibit such actions if the vessel is incomplete or if the owner has not taken the vessel from the shipyard. The Fifth Circuit Court of Appeals disagrees. In Lundy v. Litton Systems, 624 F.2d 590 (5th Cir. 1980), writs refused, the court held a shipyard liable for "shipowner's negligence" for injury aboard an incomplete vessel whose ownership had never transferred to the shipowner. Contrary to settled maritime law, a shipyard worker will have a maritime tort remedy which never has and is not afforded other maritime workers.

---

[8] *Ryan*, *supra*, note 2.

[9] As elsewhere discussed herein, shipyards, shipbuilders, and ship repairmen did not participate in this "trade-off".

[10] 33 U.S.C. §905(b).

[11] *Gay v. Ocean Transport and Trading Ltd.*, 546 F.2d 1233 (5th Cir. 1977); *Smith v. M/V CAPT. FRED*, 546 F.2d 119 (5th Cir. 1977); *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3rd Cir. 1977), cert. den. 423 U.S. 1064.

Although the benefits provided under the Act are the most liberal of any such similar compensation system in the United States, shipyards can be sued by employees for negligence actions. Actions for maritime negligence and generous benefits provided under the Act, place an impossible burden on the shipyard employer. Negligence actions should be prohibited. Employers should be responsible for worker's compensation exclusive of any theory of tort recovery.

V.

Shoreside Extension of Shipyards in the 1972 Amendments to the Act was Included Through Oversight

The Longshoremen's and Harbor Workers' Compensation Act was conceived, created and enacted for longshoremen, not shipbuilders or ship repairmen. The development of coverage and expanded jurisdiction for longshoremen is an overriding fact which must be considered throughout any discussion of the problems which beset shipbuilders and ship repairmen. In fact, because shipbuilders and ship repairmen were "orphaned" into the Act, problems and difficulties for shipyards have been magnified beyond those encountered by other maritime interests.

A. Shipyards were "Orphaned" into the Longshoremen's and Harbor Workers' Compensation Act.

Originally, the problem at issue was whether a longshoreman injured over navigable water could recover under a state workers' compensation statute. In reviewing the problem presented by longshoremen, the United States Supreme Court in Southern Pacific Company v. Jenson,[12] decided in 1917 that the states were without power to extend a state workers' compensation remedy to longshoremen injured over navigable water. The Jensen line was established at the water's edge to divide shoreside injuries to longshoremen from amphibious injuries to longshoremen. The immediate repercussions of this decision did not directly involve those engaged in the shipbuilding industry.

Subsequent to Jensen, Congress twice enacted legislation to authorize the states to apply their compensation statutes to injuries over navigable water. Twice, the United States Supreme Court disallowed such legislation as unlawful delegations of Congressional power.[13]

---

[12] 244 U.S. 205

[13] Washington v. W. C. Dawson & Company, 264 U.S. (1924); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920).

Following its second futile attempt to empower state workers' compensation remedies coverage to longshoremen injured over navigable water, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act in 1927. The purpose of the Act was to provide a compensation remedy to longshoremen injured over navigable water and employees of maritime interests who could not be covered by stated workers' compensation statutes.

In shipyards, the Act applied to a limited number of employees. Only employees engaged in the repair of a ship and injured over navigable water had to receive a workers' compensation remedy provided by the LHWCA.[14] Any shipyard worker, irrespective whether engaged in new construction or ship repair, had to receive workers' compensation benefits pursuant to state law. Likewise, workers engaged in new ship construction and injured over navigable water were covered under state law, since contracts for new ship construction are not under admiralty jurisdiction.[15]

For 35 years after enactment of the Longshoremen's and Harbor Workers' Compensation Act, the provisions of the Act applied to only a limited class of employees in the shipbuilding industry--ship repairmen engaged in the performance of maritime contracts of repair and injured over the navigable waters of the United States.

---

[14] Gonsalves v. Morse Dry Dock & Repair Co., 266 U.S. 171 (1924); New Bedford Dry Dock Company v. Purdy, 258 U.S. 96 (1922).

[15] Grant-Smith-Porter Ship Co. v. Rhode, 257 U.S. 469 (1922); Thames Tow Boat Co. v. The Schooner McDonald, 254 U.S. 242 (1920).

Expansion of jurisdiction in shipyards arose from the courts, not the Congress. In 1962, the United States Supreme Court expanded the coverage of the Act to embrace shipyard workers engaged in the new construction of vessels over navigable waters.[16] The Supreme Court, interpreting Congressional intent formulated for enactment of the original statute concerning longshoremen, extended coverage to shipyard workers injured over navigable water while engaged in the construction of new vessels. Albeit Calbeck was an act of "judicial legerdemain", the coverage test in conformity with the Jensen line was praiseworthy. For subsequent to Calbeck, all shipyard workers injured over navigable water could be covered under the provisions of the United States Longshoremen's and Harbor Workers' Compensation Act. Those workers engaged in new ship construction could also be covered under state compensation law. These clear lines of demarcation coupled to the election of remedies doctrine arising from the "twilight zone" concept removed all confusion and inequity regarding jurisdiction and coverage.

An injured employee was often confronted with a dilemma: Was his injury covered under state workmen's compensation law or the Longshoremen's and Harbor Workers' Compensation Act? The United States Supreme Court resolved the issue recognizing that some workmen were afforded an "election of remedy" if their injury occurred within an area of concurrent state-federal jurisdiction, commonly referred to as the "twilight zone."[17]

---

[16] Calbeck v. The Travelers Insurance Company, 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed.2d (1962).

Today, since state workmen's compensation law can cover certain classes of shipyard workmen injured over navigable water, the "twilight zone" remains a viable doctrine in the shipbuilding industry.[18] Hence, subsequent to Calbeck, jurisdiction and coverage issues were eliminated. Application of LHWCA was clearly delineated. This idyllic situation was to last for only ten years.

B. Longshoremen Sought Change In Jurisdiction and Coverage.

Longshoremen were dissatisfied with the coverage and jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act, and longshoremen again approached the courts for extension of the jurisdiction shoreward. However, the United States Supreme Court in Nacirema Operating Co. v. Johnson[19] interpreted the Longshoremen's and Harbor Workers' Compensation Act as not providing coverage to longshoremen on the shoreward side of the Jensen line even though injured while loading or unloading a vessel. In concluding the opinion in Nacirema, Justice White wrote:

---

[17] Davis v. Department of Labor, 317 U.S. 249 (1949).

[18] Territo v. Poche, 339 So.2d 1212 (La. 1976), writs of cert. denied, 98 S.Ct. 31 (1977).

[19] Nacirema Operating Co. v. Johnson, 396 U.S. 212, 90 S.Ct. 347, 24 L.Ed.2d 371 (1969).

> "there is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the Extension Act to amend the longshoremens act would not affect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the act. In construing the longshoremens act to coincide with the limits of admiralty jurisdiction-whatever they may be and however they may change-simply replaces one line with another whose uncertain contours could only perpetuate on the landward side of the Jensen line, the same confusion that previously existed on the seaward side. While we have no doubt that Congress had the power to choose either of these paths in defining the coverage of its compensation remedy, the plain fact is that it chose instead the line in Jensen separating water from land at the edge of the pier. The invitation to move that line must be addressed to Congress, not to this Court."[20] (Emphasis supplied.)

In 1972, Congress accepted the Court's invitation to extend jurisdiction shoreward for longshoremen. The Court's invitation had been prompted by longshoremen, and Congressional action was likewise prompted by longshoremen. The impetus for the 1972 Amendments resulted from a tripartite compromise among longshoremen, ship owners and stevedores. Each party received a substantial benefit. Longshoremen received greatly expanded benefits in return for removal of the right to sue a vessel for unseaworthiness. The ship owner was relieved from suits by longshoremen for the vessel's unseaworthiness. The stevedore was relieved of its dual obligation of having to pay both workers' compensation benefits and indemnity to the ship owner for claims brought by its longshoremen for the vessel's unseaworthiness.[21]

---

[20] Id., 396 U.S. 224, 90 S.Ct. 354.

The Subcommittee on Compensation, Health and Safety of the Committee on Education and Labor of the House of Representatives has received testimony from various participants in the compromise negotiations. Hon. Donald E. Elisburg,[22] Ralph M. Hartman,[23] and Dennis Lindsay[24] have each testified that the shipbuilding industry was not involved in the protracted negotiations which resulted in the compromise leading to the 1972 Amendments to the LHWCA.

---

[21] §905(b) has been interpreted to allow recover by a longshoreman or shipyard employee for maritime negligence against his employer who is also the owner or owner *pro haec vise* of a vessel. *Gay v. Ocean Transport & Trading, Ltd.*, 546 F.2d 1233 (5th Cir. 1977); *Smith v. The M/V Capt. Fred*, 546 F.2d 119 (5th Cir. 1977); *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1977), cert.den. 423 U.S. 1054. A shipowner may also be sued for maritime negligence. Since 1972, the theory of maritime negligence has been expanded such that it closely resembles the strict liability principles of unseaworthiness.

[22] Assistant Secretary of Labor for Employment Standards, 1977-1980.

[23] Director, Office of Workers' Compensation Programs.

[24] Counsel, Master Contracting Stevedore Association of the Pacific Coast, Inc.

C. Shipyards Included in 1972 Jurisdiction Amendments Through Oversight.

The 1972 Amendments represent the first Congressional action to specifically extend coverage to shipbuilders engaged in new construction of vessels and the first Congressional action to extend coverage for shipbuilders and ship repairmen beyond the water's edge, i.e., the Jensen line. However, a thorough review of the Hearings on the 1972 Amendments failed to reveal any testimony assisting the House or the Senate in establishing reasonable jurisdictional parameters for shipyards. The bills then under consideration did not contain proposed language to alter jurisdiction in shipyards. The sole reference to the shipbuilding industry was a letter by Edwin M. Hood, President of the Shipbuilders Council of America, who declined to take a position on a jurisdictional change in shipyards in the absence of amendatory language. Moreover, since the LHWCA was created for longshoremen, the information amassed, the examples afforded, and the general discussions concerned longshoremen. Examples of jurisdictional inequities offered during the Hearings on the 1972 Amendments were drawn exclusively from longshore employment.

As a result of a "midnight meeting", wherein representatives of longshoremen, ship owners, stevedores, and Department of Labor negotiated a previously discussed tripartite compromise, the jurisdiction provisions of the Act were inadvertently amended. This Committee has not received testimony from any individual which has indicated that it was the intent of Congress in 1972 to amend jurisdiction for shipyards. To the contrary. the evolution of the 1972 Amendments regarding jurisdiction reveals that coverage for longshoremen was to be extended shoreward for ship owner and stevedore relief from unseaworthiness claims. Shipyards, shipbuilders and ship repairers were not part of the conferences or negotiations which gave birth to the shoreward extension of the LHWCA in 1972.

The oversight occurred in a staff conference between House and Senate Committees. In the process of attempting to implement the negotiated compromise among longshoremen, ship owners and stevedores, the conferees failed to exclude shipyards from the provisions extending jurisdiction shoreside. As might be expected from action lacking deliberate consideration, utter havoc has been caused, and continues to be caused, in the shipbuilding industry.

In 1972 Amendments failed to define "shipbuilders" and "ship repairmen". Confronted with the necessity to determine which shipbuilders and ship repairmen are covered under the LHWCA, the courts have been compelled to employ far-reaching efforts. Consequently, the results have conflicted. Moreover, the United States Supreme Court has refused to hear and to bring clarity to jurisdiction and coverage in shipyards.

The confusion resulting from attempts to define jurisdiction and coverage, with resultant increase in litigation of jurisdictional issues, confirms that shipyards were included in extension of shoreside jurisdiction in 1972 through an oversight, not by design.

D. Shipyards Are Indistinguishable From Other Industrial and Fabricating Plants.

Traditionally, shipyards workers, other than ship repairmen injured over navigable water, have received their workers' compensation remedy under the remedies provided by the several states. These traditional remedies were effected by the 1972 Amendments for one reason. Since ship repairmen injured over navigable water can obtain workers' compensation only under the LHWCA, it has been assumed, without hearing from informed parties or discussion, that all shipyard workers perform similar work, are exposed to similar hazards, and are similarly situated. As a consequence of this erroneous assumption, it was apparently concluded that if ship repairmen injured over navigable water must be covered under the Act, all shipyard workers must be covered under the Act. The facts do not justify such conclusion.

The work performed is similar to work performed in industrial and manufacturing plants throughout the United States. In many such shipyards, most of the work is performed in shops or in closed buildings. In many such shipyards, most of the component fabrication is performed in shops and assembly is performed on buildingways, either at ground level or a few feet off the ground.

Attached hereto as Appendix I is an overlay of a shipyard depicting the typical components of a shipyard. [For purpose of the record, a copy of each page of the overlay is provided.] Review of these components will confirm that the work performed in shipyards is similar to work performed in industrial and manufacturing plants throughout the United States. First, administrative and office space is designated. Generally, under the Act, administrative personnel are not covered.

Second, storage areas for raw materials and components received from suppliers is identified. Such storage areas are essential to any type of industrial and manufacturing process.

Third, fabrication shops are shown. These shops include workers engaged as machinists, electricians, pipefitters, painters, component fabricators, and related shop workers. The types of equipment used by these employees, the methods employed, and the skills utilized are the same as those found in shops and manufacturing plants utilizing one or more of these skills. In fact, work in these shops has produced many products and components which have not been incorporated into vessels. Finally, it should be noted work performed in these shops is in closed buildings which could be located anywhere in the country.

Fourth, the sub-assembly area is shown. Sub-assembly is the combination of one or more components. In some shipyards this work is performed, at least in part, inside buildings. In other shipyards, the work is performed outdoors. Again, the type of work is similar to the fabrication of railroad boxcars, mobile trailer homes, building construction and innumerable building and manufacturing processes.

Fifth is the erection area. Virtually all shipyards have what is known as a "buildingway." Again, the buildingway in some shipyards is indoors. However, most shipyards have a buildingway or final erection area outdoors. It is interesting to observe that the erection area in modular assembly shipyards looks similar to the erection and attachment of apartment buildings or office buildings.

To this point, there is nothing in the process which makes it uniquely maritime in nature.

Sixth, the final component is outfitting. Outfitting is performed over water after the vessel is launched. It is only after the vessel is launched or in final stage of erection that the materials being worked upon appear to be a vessel. More importantly, workers engaged in outfitting over navigable water generally remain in that area.

The work in shipyards is performed in a typical, manufacturing assembly line process, Indeed, until the final state of assembly, i.e. outfitting, the nature of the operation and the work performed are indistinguishable from any other process. Only in the last stage of construction is it possible to determine that the work product is a vessel.

Since contracts for new ship construction are not under the admiralty and general maritime law, since construction resembles the industrial and fabricating process of plants throughout the United States, and since repair work, which is covered by admiralty law, is generally performed over navigable water, shipyard workers working on land should not be covered under the provisions of the United States Longshoremen's and Harbor Workers' Compensation Act.

VI.

The Remedy: S. 1182

S. 1182 achieves the balance necesary to provide workers' compensation benefits and to assure an affordable, insurable workers' compensation system. Review of the provisions of S. 1182 will highlight the remedy for existing abuse, prejudice, overutilization, unaffordability and unpredictablity.

A. Jurisdiction

Section 2 and 3 of the Longshoremen's and Harbor Workers' Compensation Act provides clarity to the morass of jurisdictional issues and unresolved questions. As previously discussed, unnecessary litigation has resulted from shoreside extension of jurisdiction in shipyards.

S. 1182 establishes the clearest line of demarcation as the jurisdictional basis for the Act. If injured over water, a shipyard worker would be covered by the provisions of the Act. If injured over land, the shipyard worker would be covered under the provisions of state law. All confusion and misunderstanding of jurisdiction in shipyards would be placed to rest.

The concept of "water's edge" jurisdiction should be enacted by Congress to avoid the ills which have plagued shipbuilders and ship repairers since the inadvertent enactment of the 1972 Amendments regarding shipyard juridiction.

B. Annual Escalation Clause

Section 10 (f) is the single most costly item in the Act. In the last three years, benefits have been escalated at about 8% per year. The escalation factor is determined by the rise in national average weekly wages.

The Shipbuilders Council of America would recommend that the escalation clause be repealed. Workers' compensation benefits established at the time of injury provide the only predictable and affordable way to compute compensation entitlement. Moreover, if this provision is repealed, the insurance industry has indicated that compensation costs would be reduced by 10-15%, yet basic compensation benefits would not be reduced.

The escalation clause allows a few claimants to receive distorted benefits at a very high level, while the vitality of the entire workers' compensation program is threatened.

C. Permanent Total Disability

Section 8 (a) of the Act would be amended to avoid the possibility of an individual receiving an award for permanent total disability while such person was engaged in gainful employment. The amendment to Section 8 (a) of the Act would serve to avoid the incongruity of double recovery for permanent total disability benefits and receipt of wages.

D. Loss of Wage-Earning Capacity

Section 8 (c) (21) and Section 8 (h) of the Act would be amended to avoid the current abuse of the loss of wage-earning capacity provisions. Section 8 (c) (21) was created to assure that an employee who had a permanent partial disability to earn wages was provided compensation. Interpretation of this provision by the Benefits Review Board has allowed fictitious awards for loss of wage-earning capacity. The fiction arises wherein the employee's earnings after injury equal or exceed his wages before injury. In spite of actual earnings in excess of his pre-accident earnings, the Benefits Review Board has authorized a theory whereby such individual can receive compensation for loss of wage-earning capacity.

The afore-enumerated amendments would only confirm that if an employee earns more wages after an accident than before an accident, the employee could not be granted a fictitious award for loss of wage-earning capacity. Since his actual earnings are in excess of his pre-accident earnings, the employee has not in fact lost any wages.

E. Maximum Limitation for Death Benefits

Section 6 (b) (1) of the Act would correct another inadvertence which resulted from the "midnight session". The maximum limitation for death benefits would be established as the same maximum for disability benefits. All parties, including the Department of Labor, have concurred that the omission of the words "or death" in the afore-enumerated section was an inadvertence. On the other hand, if the proposed amendment is not enacted, this portion of the Act will remain unpredictable, and, hence, uninsurable.

F. Unrelated Death Benefits

Section 8 (d) (3) should be repealed. Section 8 (d) (3) of the Act allows for compensation benefits for death unrelated to employment. If an employee is found to be permanently and totally disabled or to have sustained a loss of wage-earning capacity under Section 8 (c) (21), his survivors are entitled to death benefits irrespective of whether the employee's death is related to employment. If the employee dies on vacation, dies from natural causes, dies from an automobile accident, dies from an industrial accident for another employer, the original employer is responsible for the payment of death benefits. This form of social welfare insurance has never been justified.

The full impact of this provision has not yet been felt. As the Benefits Review Board expands the definition of permanent total disability and the definition of loss of wage-earning capacity, more persons will fall in those categories. Upon their death, employers will be called upon to make death benefits in accordance with the provisions of the Act. The inherent unpredictability of this circumstance is quite apparent. Realistically, the unaffordability of such provision is unquestioned.

Unrelated death benefits must be repealed to avoid unjustified, windfall recovery for a few employees at the expense of all other employees.

G. Spendable Earnings as a Basis for Maximum Weekly Benefit

Section 6 (e) would join the preponderance of most workers' compensation systems and establish "spendable earnings" as the basis for computation of compensation benefit entitlement. This concept has worked well in those states which have adopted the concept.

H. Medical Care

Section 7 (b) would protect an employee from physicians who are not specialized to handle the employee's type of medical illness or condition. Prior to the 1972 Amendments, an employer would appoint a designated number of physicians to each medical specialty identified by the Deputy Commissioner.

Currently, an employee can choose treatment from any physician. The problem is that employees often select physicians who are not specialized or as well trained to handle the employee's particular medical condition or problem.

The Amendment would embrace both concepts. The Deputy Commissioner would identify medical specialties. The employer would identify physicians for each specialty. However, the number of physicians in a given specialty would not be limited. This designation process would not relegate the employee to a handfull of physicians, but it would assure that the employee is treated by a physician specialized or competent to handle the employee's particular illness or condition.

I. Independent Medical Examination

Section 7 (e) of the Act would designate the responsibilities of the physician conducting the independent medical examination. The independent medical examination would be conducted at the request of the Department of Labor. Disability estimates would be in accordance with the American Medical Association's Guidelines for the Evaluation of Orthopedic Impairment. In circumstances wherein the employee had a disability pre-existing his injury, the physician would provide designated information which would be used to resolve the issues of the Second Injury Fund pursuant to Section 8 (f).

Section 7 (f) of the Act would require that an employee, upon appropriate request, submit to such physician examination as may be designated by the Deputy Commissioner. Failure to undergo such examinations would result in suspension of compensation payments.

Unless the parties can accurately determine an injured employee's medical status, compensation entitlement cannot be ascertained. Often, claimants will attempt to avoid medical examination as a strategy to enhance the compensation claim. This amendment would reduce the games of strategy and would provide the Deputy Commissioner with a basis to obtain current and complete medical evaluations.

J. Settlements

The parties are in the best position to assess their respective positions. After deliberation and conference, the parties may agree upon a settlement which takes into consideration the strengths and weaknesses of each party. Upon submission to the Department of Labor, however, the settlement may be rejected. Often, the parties are not advised the basis upon which the settlement is rejected.

Section 8 (i) (A) is amended to provide that when the parties submit an application for approval of settlement to the Deputy Commissioner or Administrative Law Judge, the settlement can only be disallowed for good cause. Whenever the settlement is disallowed, the Deputy Commissioner or Administrative Law Judge must assign reasons in support thereof. Either party would be entitled to appeal the disallowance.

Section 8 (i) (B) is amended to provide that the parties can agree to a 4% discount upon any settlement. At present, Section 14 (j) allows for 4% discount on lump sum payment of any permanent partial disability award. The proposed amendment would allow a 4% discount on any settlement, assuming the parties were in agreement that same should apply.

K. Notice

Section 14 (b) would be amended to provide that compensation benefits would commence from the fourteenth day after an employer had actual knowledge of an injury. In many instances, an employer was not afforded notice of injury. However, the employer, after requisite notice, may commence the payment of compensation. In light of decisions by the Benefits Review Board, the employer may be held liable for penalties, interest and/or attorneys' fees for compensation which was not paid prior to actual knowledge. The amendment seeks to avoid another fiction and to establish an objective criteria which can be easily administered.

Section 14 (d) is amended to provide that notice of controversion of a claim must be filed 14 days after receipt of notice of filing of a claim from the Deputy Dommissioner. Current Benefits Review Board decisions may have corrected previous decisions which held that an employer had to file a notice of controversion before a claimant filed a claim for compensation. However, the uncertainty of administrative change should require that this objective standard is incorporated into the Act.

Section 12 (d) is amended to provide that an employer must have actual notice of injury. Often, long after an employee has a heart condition, stroke, metabolic process or traumatic injury treated under his group hospitalization program, he may make a claim under the Act. If this claim is made years after the date of alleged injury, an employee may aver that the employer had implied knowledge. Disposition of the issue is quite subjective. The amendment would provide objective criteria to assure an evenhanded administration of the Act.

L. Coordination of Benefits

Section 14 (n) would be added to provide for coordination of benefits. In previous testimony and statistics provided by the Shipbuilders Council of America, it is not unusual for an individual to receive in compensation payments, Social Security payments and pension payments, sums in excess of 150-175% of the net take home pay. Aggregate receipt of all sums provides disincentive for return to work. The method set forth in the proposed amendment would balance incentive to return to work with the receipt of Social Security or pension benefits.

VIII.

Conclusion

The Shipbuilders Council of America has demonstrated its ability to identify the issues which are the heart of this Act's problems. Previous testimony before the Subcommittee of Health, Compensation and Safety of the Committee on Education and Labor of the House of Representatives demonstrated that the Shipbuilders Council of America has attempted to work, without success, with the Department of Labor at all levels to correct the non-statutory problems. Accordingly, the Shipbuilders Council of America desires to work with the Congress in finding reasonable solutions to each and all of the problems which are existent under the provisions of the Act.

S. 1182 provides substantial remedy of a workers' compensation system which is out of control. All issues are not addressed and the answers to all questions have not been provided.

Senator Nickles. Mr. McElveen?

Mr. McElveen. Mr. Chairman, my name is J. C. McElveen, and I would like to present a brief summary of my statement.

Senator Nickles. Very brief. I think that the two buzzes is telling us that we are going to have a rollcall pretty quick, and we do have another panel, so it is going to pose a problem.

Mr. McElveen. My associates and I, as trial practitioners, have tried or settled in excess of 800 Longshore Act claims, many for the Newport-News Shipbuilding & Drydock Co. in Virginia. I have tried cases both under the Federal act and State acts, in Virginia, New York, West Virginia, and Tennessee.

The bill, in our view, is a very worthy effort. We support the Nickles-Nunn bill. At the same time, my statement goes into some more detail about the extent to which we think certain provisions of it can be further strengthened.

We feel the bill makes major improvements in existing law by eliminating the presumption of compensability, which at the present time, as construed by the courts, equates the filing of a claim with a prima facie showing on the plaintiff's behalf. We think the statute does not encourage workers to return to work, and the bill does encourage that, and we feel the bill's language may, in fact, even be strengthened further to encourage mandatory rehabilitation.

We feel the method proposed in the Nickles-Nunn bill for computation of benefits eliminates the financially significant problem of claimants receiving compensation at an average weekly wage which exceeds that earned by the claimant prior to the injury.

We feel the bill makes important changes in the statute of limitations and notice requirements, in order to eliminate stale claims, and we have suggested in our statement further changes that might be made in order to eliminate fraudulent and frivolous claims.

We feel the bill encourages treatment by qualified physicians and discourages physician shopping by returning to the concept of a specialized panel of physicians, and I would echo Chairman Sam Smith's comment here yesterday that, to the extent board-certified physicians in specialties qualified to treat these various maladies are able to be selected, that is preferable to allowing a claimant's illness or injury to be treated by a general practitioner.

We feel the bill more realistically defines the role of the Secretary and imposes a mandatory detailed reporting requirement for physicians as a prerequisite to payment. We urge you to take a look at the problem that has come about by virtue of the explosion of administrative requirements under this statute. That particular requirement has been interpreted by the Labor Department to mandate creation of a form for almost every conceivable possibility, a large roll of which I have brought with me today. All these forms simply bog down the claims process, quite frankly, and harm employees more than the employer by making that type of thing take longer to process.

Senator Nickles. Are you talking about our bill as it is now written? Are you talking about requiring the physician to fill out that form under our bill?

Mr. McELVEEN. Right. Well, those are two separate points that I sort of put together for speed and convenience. We feel the physicians need to report to the Secretary and to the employer on a regular basis how the claimant's condition is coming along. We do not think that the forms that are required by the Office of Workers' Compensation programs in very large volume, for almost every conceivable problem, should continue to have to flow from the employer as long as the Office of Workers' Compensation programs has a good idea of what status the claim is in by these periodic medical reports.

Senator NICKLES. You are not saying that those forms were required under this bill?

Mr. McELVEEN. No, no.

Senator NICKLES. OK.

Mr. McELVEEN. We further support the concept in the bill that will help eliminate unnecessary injuries by barring compensation for employees who intentionally falsify information on the preemployment medical histories, and we think that concept has received pretty uniform support throughout the days of the hearing.

We feel the bill can further be strengthened by mandating a termination of compensation when an employee refuses to be examined by an employer-selected physician. We feel the bill should mandate employee cooperation as a condition not only to continue compensation, but also to the payment of medical costs and attorneys' fees.

We feel that the bill could be strengthened by requiring that costs and attorneys' fees be awarded to employers defending what are ultimately determined to be fraudulent and frivolous claims. This would increase the risk the frivolous litigation would entail and help deter employees from filing fraudulent claims.

Finally, the Shipbuilders' Council is strongly in support of retaining the second injury fund as it presently stands, and we feel the bill could be strengthened if it did not create an additional and unnecessary bureaucracy by establishing an office of second injury fund custodian. Our view on that point is that the escalating special fund assessments stem from the abuse employers experience under the act, and if those abuses are remedied by the bill, that would relieve pressure on the fund. The creation of an office of second injury fund custodian does little to address the merits of the problem and in fact duplicates activities and responsibilities of the Director of the Office of Worker's Compensation Programs.

Mr. Chairman, that concludes my statement.

[The prepared statement of Mr. McElveen follows:]

STATEMENT OF JUNIUS C. MCELVEEN, JR., ESQ.
IN BEHALF OF THE SHIPBUILDERS COUNCIL OF AMERICA
ON S. 1182
TO AMEND THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT
BEFORE THE SUBCOMMITTEE ON LABOR
OF THE COMMITTEE ON LABOR AND HUMAN RESOURCES

JUNE 17, 1981

SUMMARY OF THE STATEMENT OF
JUNIUS C. MCELVEEN, JR., ESQ.
IN BEHALF OF THE SHIPBUILDERS COUNCIL OF AMERICA
BEFORE THE SENATE SUBCOMMITTEE ON LABOR

June 17, 1981

As a trial practitioner who has tried or settled over 800 Longshore cases in the past four years, I would like to endorse the Nickles-Nunn bill and, at the same time, point out areas in which it can be further strengthened to prevent abuse without obscuring the purpose of the statute - to fairly compensate workers who suffer a loss of wages as a result of occupational injury or disease.

The bill makes major improvements to existing law:

o Elimination of presumption of compensability. The bill eliminates the presumption of compensibility thereby discouraging the fraudulent and frivolous claims which have driven up insurance rates and costs. Absent this change, the Longshoremen's and Harbor Workers' Compensation Act will continue to equate tne filing of a claim with a prima facie showing on the plaintiff's behalf.

o Encouraging Workers to Return to Work. The bill encourages injured workers to return to gainful employment. However, since it is estimated that over fifty percent of the injured workers refuse rehabilitation services, rehabilitation must unequivocally be mandated for appropriate workers.

- A more accurate and equitable method for calculating disability benefits.
  The method proposed in Nickles-Nunn for computation of benefits eliminates the financially significant problem of claimants' frequently receiving compensation at an average weekly wage that actually exceeds that earned by the claimant prior to the injury.

- Changes in statute of Limitations and Notice Requirements to eliminate stale claims.
  The bill remedies one major problem by making clear that the reporting requirement in Section 30(f) of the Act (which now provides the period for filing a claim does not begin to run until the employer files a Report of Accident or Injury) arises only when the employer knows an injury is claimed to have been caused by the employment. However, Section 22 of the Act, which seems unambiguous on its face, requires attention in light of a 1974 Supreme Court ruling which had the effect of saying the one year

time period never begins to run where an employer makes payment voluntarily. A provision should be added to Section 22 requiring a modification petition be filed within one year of the last compensation payment, whether or not the payment was made pursuant to an order.

- Discourages physician shopping.
  The bill insures treatment by qualified physicians and discourages physician shopping by returning to the pre-1972 concept of a specialized panel of physicians. This system insures treatment oversight and quality care, while providing employers relief from excessive medical costs.

- Provides more effective medical treatment oversight.
  The bill more realistically defines the role of the Secretary and imposes a mandatory detailed reporting requirement for physicians as a prerequisite to payment.

- Helps eliminate unnecessary injuries.
  The bill will help eliminate unnecessary injuries by barring compensation for employees who intentionally falsify information on pre-employment medical histories. It removes the burden of fraud from the employer and places it where it belongs, on the wrongdoer.

In addition to certain of the above observations, the effectiveness of the bill could be further strengthened if it:

- Mandated a termination of compensation when an employee refuses to be examined by an employer — selected physician.

  The bill should mandate employee cooperation as a condition not only to continued compentation, but also to the payment of medical costs and attorneys' fees.

- Further remedied the unjustifiable administrative burdens of the present Act.

  The unreasonable paperwork burden of requiring that medical reports be filed each time an injured employee is treated should be replaced with a requirement that employers only maintain a record of injury available for inspection by the Deputy Commissioner upon advance notice to the employer.

- Required costs and attorneys fees be awarded to employers defending fraudulent and frivolous claims.

  This would increase the risks frivolous litigation would entail and help deter employees from filing fraudulent claims and unmeritorious appeals.

- Did not create an additional unnecessary bureaucracy by establishing an Office of Second Injury Fund Custodian.

  The escalating Special Fund assessments stem from the abuse employers experience under the Act. The abuses remedied by the bill will relieve pressure on the Fund. The creation of the Office of Second Injury Fund Custodian does little to address the merits of the problem and, in fact, duplicates activities and responsibilities of the Director of the Office of Workers Compensation Programs.

Table of Contents

Introductory Remarks 1

A. By Eliminating the Presumption of Compensability, S. 1182 Discourages Fraudulent and Frivolous Claims . 3

B. Although S. 1182 Encourages Workers to Return to Work, Mandatory Rehabilitation Should be More Explicit 8

C. S. 1182 Provides a more Accurate and Equitable Method for Calculating Disability Benefits 10

D. The Act Must Have a Realistic Statute of Limitations and Enforceable Notice Requirements in order to Eliminate Stale Claims 11

E. Medical Services Must be Provided in a Reasonable and Controlled Manner 18

  1. S. 1182 Insures Treatment by Qualified Physicians and Discourages Physician Shopping 20

  2. Oversight of Medical Treatment Must be Insured by Mandatory Physician Reporting Requirements 21

  3. S. 1182 Snould Mandate Termination of Compensation When an Employee Refuses to be Examined by an Employer Selected Physician 22

F. S. 1182 Will Help Eliminate Unnecessary Injuries by Barring Compensation for Employees Who Intentionally Falsify Information on Pre-employment Medical Histories 24

G. The Act Imposes Unjustifiable Administrative Burdens that are Partially Remedied by S. 1182 28

H. In Order to Discourage Fraudulent and Frivolous Claims, S. 1182 Should be Amended to Require Costs and Attorneys Fees be Awarded to Employers Defending such Claims 34

I. S. 1182 Should Not Create an Additional Unnecessary Bureaucracy by Establishing an Office of Second Injury Fund Custodian 37

STATEMENT OF JUNIUS C. MCELVEEN, JR., ESQ.
IN BEHALF OF THE SHIPBUILDERS COUNCIL OF AMERICA
BEFORE THE SENATE SUBCOMMITTEE ON LABOR

June 17, 1981

Mr. Chairman, members of the Committee, my name is Junius C. McElveen, Jr. and I am a partner in the law firm of Seyfarth, Shaw, Fairweather and Geraldson in Washington, D.C. Nationwide, our firm has handled workers' compensation litigation in more than 15 states. Although we do some state work from the Washington office, our primary practice has been under the Longshoremen's and Harbor Workers' Compensation Act. In the four years I have been with the firm, my associates and I have tried or settled over 800 Longshore cases. I have defended claims involving the interpretation of almost every section of the statute, including issues involving jurisdiction, average weekly wage, scheduled disabilities, wage earning capacity loss, occupational disease and discriminatory discharge. From the standpoint of a trial practitioner, I would like to endorse the Nickles-Nunn bill generally and point out some areas in which I think the legislation can be further strengthened to prevent abuse without obscuring the real purpose of the statute - to compensate workers fairly who suffer loss of wages as a result of occupational injury or disease.

The amendments to the Act contained in S. 1182 will effectively discourage fraudulent and frivolous claims, control and regulate the provision of medical services, and encourage workers to return to work. The bill accomplishes these goals by eliminating the presumption all injuries and illnesses are work-related and by supplying meaningful penalties for workers who commit fraud or file frivolous claims. The bill sets out a practical scheme for the selection of physicians and their utilization. Workers are encouraged to return to work by rational benefit levels and mandatory rehabilitation. Finally, reasonable statutes of limitation are provided.

There are, however, certain areas where the Act could be further strengthened. Workers who file and pursue frivolous claims should be liable for the employer's attorneys' fees in defending such claims. Therefore, section 26 should be strengthened to provide fee awards at all levels against such claimants. The mandatory rehabilitation provision contained in the bill before this committee should be strengthened to provide that a worker is deemed suitable for rehabilitation unless substantial evidence exists to the contrary. The filing and other administrative burdens under the act should be reduced. Workers should be required to utilize a specific form for filing claims and notifying their employer of their injuries. Moreover, voluntary payments by employers should be encouraged by amending section 22 to provide an employer's liability for compensation will terminate one year after final payment, even in the absence of an order. Finally, the Second Injury Fund should be left as is.

A. By Eliminating The Presumption of Compensability, S. 1182 Discourages Fraudulent And Frivolous Claims

Section 20 of the Longshoremen's Act, 33 U.S.C. § 920, provides, in pertinent part, "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary -- (a) that the claim comes within the provisions of this Act." As construed, this presumption re-allocates the traditional burden of proof in workers' compensation cases, permitting a claimant to make a prima facie case simply by offering unsubstantiated testimony of pain. The employer must then offer substantial evidence the alleged pain did not arise out of or in the course of the claimant's employment. The ease with which an employee can transfer the burden of proof encourages frivolous and fraudulent claims and forces employers to settle claims that could not succeed under any other statute.

Nothing in the language of Section 20 even remotely suggests the presumption applies to the issue of whether an injury (or disease) arose out of and in the course of the claimant's employment. Such an interpretation has now universally been accepted by the courts of appeal, however, even though it is not needed to aid truly deserving injured workers. Accordingly, the burden is entirely upon the employer even where there is no evidence whatsoever to indicate the claimant was injured at work.

Application of the presumption often leads to results that defy common sense. In Marra Brothers, Inc. v. Cardillo,[1] for example, an employee had been found dead in the forepeak of a ship, 18 days after he was last seen alive and on shore. Although there was no evidence as to how he had died, the Court awarded death benefits, noting the presumption applies even when "nothing more is shown." The Court added:[2]

> . . . [W]e go further. We conclude that if [the decedent] had been found dead in the forepeak of the [ship] with a knife in his back, nonetheless, in order to avoid the payment of compensation it would still be necessary for the [employer] to prove by substantial evidence that his death did not arise out of or in the course of his employment . . . such is the heavy burden which section 20(a) imposes upon the employer.

---

[1] 154 F.2d 357 (3rd Cir. 1946).

[2] 154 F.2d at 359.

Even when there is no evidence an injury is work-related, moreover, the presumption is conclusive unless the employer can produce "substantial evidence" to rebut it. In addition, the courts have often seemed to interpret the substantial evidence requirement to mean overwhelming evidence. Recently, the District of Columbia Circuit awarded benefits to a bus driver who claimed driving on bumpy roads had aggravated his psoriasis. The Court majority held the presumption of compensability had not been rebutted by substantial evidence, even though a board certified dermatologist, with 40 years experience, testified he did not think the aggravation of the psoriasis was work-related.[3]

A case involving one of our Council members will make my point even clearer. A 1979 claim alleged an employee had developed an upper respiratory infection (a cold) as a result of his exposure to cold and wet weather on the job. Absent any rebuttal evidence on the issue of causation, the presumption of compensability would control and the cold would be compensable. The employer was required to pay a doctor to testify colds are caused by viruses, not work-related factors. While the claim was denied, the employer was required to waste money in bringing in a physician and paying its attorneys to defend against the unsupported allegation that the cold was work-related. Although the claim was denied, the employer wasted thousands of dollars in attorney and expert witness fees simply to disprove the unsupported allegation the cold was work-related. Obviously, either the claimant or his attorney recognized they could win their case or obtain a favorable settlement if the employer were unwilling to spend the money to rebut the presumption.

---

[3] Hensley v. Washington Metropolitan Area Transit Authority, No. 79-2552 (D.C. Cir. filed March 17, 1980).

In summary, with the presumption of compensability to bolster a case, a claimant need only allege pain to make a prima facie case. Even if physicians testify an injury is not work-related, this may not be sufficient evidence to overcome the presumption. Unfortunately, all doubtful questions are resolved in the claimant's favor. The Benefits Review Board held several years ago:[4/]

> It is never safe for an employer in a proceeding under the LHWCA to assume that no defense against a claim is required until a certain quantum of evidence is introduced. The act virtually equates the filing of a claim with a prima facie showing on the plaintiff's behalf.

[4/] Glover v. Aerojet General Shipyard, 6 B.R.B.S. 559 (1977).

The frivolous claims encouraged by Section 20 serve to increase insurance rates and the costs of production without benefiting truly injured workers. Indeed, there is no need for the presumption where a worker was in fact injured at work. The worker can easily prove a case simply by having a physician prepare a report as to the nature and cause of injury. A review of the cases my associates and I have handled demonstrates all employees who are truly injured present such evidence despite the existence of the presumption. If an employee is unable to produce factual support for a claim, we submit that employee should be unable to access the system. Indeed, if the employee is successful in prosecuting a claim, the employer, pursuant to section 28 of the Act, is required to pay the cost of the physician's report as well as attorneys' fees. Thus, the elimination of the presumption is hardly unreasonable, but will go a long way toward eliminating fraudulent and frivolous claims.

Curiously, this provision was inserted due to Congressional misunderstanding of the status of state compensation law when the Longshoremen's Act was passed in 1927. During the course of debate, one Congressman said of Section 20: "The gentleman from Virginia (Mr. Bland) objects to certain 'presumptions' he finds in the bill, but these same presumptions are to be found in every up-to-date compensation law in the United States."

73 Cong. Rec. H5412 (Remarks of Rep. O'Connor). A review of the workers' compensation statutes then in effect, indicates this statement was inaccurate. While the New York workers' compensation law, on which the Longshoremen's Act was modelled, did contain such a provision, our research reveals New York was the only state with such a provision.

We fully support elimination of the statutory presumption. It is unnecessary for truly injured employees, encourages fraudulent and frivolous claims which drive up insurance rates and costs, and is virtually unique in the area of workers' compensation law.

B. Although S. 1182 Encourages Workers To Return To Work, Mandatory Rehabilitation Should Be More Explicit.

The Longshoremen's Act presently lacks one of the essential ingredients of any effective workers' compensation law -- a mandatory rehabilitaton requirement. The practical importance of such a mandatory requirement in achieving what should be the end goal of the Act -- to encourage workers to return to gainful employment -- cannot be overemphasized. The Act, as it now stands, encourages injured workers to forego rehabilitation. If a worker can show injuries prevent a return to regular work and he or she is not trained to perform any new work, the worker may be entitled to collect total disability for life. This is true even though the worker is, in fact, capable of performing work. On the other hand, if the worker undergoes rehabilitation and job re-training, return to work is very likely.

The need for statutorily-mandated incentives for rehabilitation is clear. One Labor Department rehabilitation specialist estimates that over fifty percent of the workers he has contacted refused rehabilitative services. Further, the Benefits Review Board has held that since the Act does not contain a provision requiring rehabilitation, no mandatory rehabilitation requirement can be inferred. This holding flies in the face of a key purpose of the Act -- to encourage employees to return to work. It requires corrective action by Congress.

We support the concept of a tightening of the statute to require rehabilitation for appropriate workers. In this regard, we would suggest the language of the section on rehabilitation could further be strengthened by adding the following:

> All injured employees shall be deemed suitable for rehabilitation unless substantial evidence is produced to show such rehabilitation is not possible. Lack of desire to participate in vocational rehabilitation alone shall not be a reasonable basis for refusal to so participate.

A similar disincentive for employees to return to work is that they may refuse offers of light duty employment without adverse consequences. Many judges have sanctioned this practice by holding that the offered light duty employment is sheltered employment, and, therefore, not to be considered in determining an employees true wage earning capacity. The bill before this committee would cure this problem by requiring "sheltered" employment to be considered in determining wage earning capacity loss. We strongly support this provision.

C. S. 1182 Provides A More Accurate And Equitable Method For Calculating Disability Benefits.

The purpose of compensation is, or should be, the replacement of wages lost as a result of industrial injury or disease. Under the existing scheme, an employee's computed wage may exceed actual wages earned prior to injury. Presently, section 10 assumes all workers normally work throughout the year. Thus, an employee's average daily wage is multiplied by the total number of work days in a year when calculating compensation rates. Unfortunately, many shipyard workers, especially those in small repair yards, normally work less than a full year because work is sporadic. The Act presently ignores this reality.

Assume Worker A earns $10,400 a year and works every day of the year prior to an industrial injury. Worker A's average daily wage is $40.00, average annual earnings are $10,400 and the average weekly wage $200.00. Assume Worker B is on strike (or laid off) for 9 weeks in a year also prior to an industrial injury. Worker B's average daily wage is still $40.00 because total earnings of $8,600 are divided by the 215 days actually worked. Likewise, Worker B's average annual earnings are $10,400 ($40.00 x 260 days). Thus, Worker A, who worked the entire year, and Worker B, who worked considerably less, are compensated equally under the Act. S. 1182 redresses this inequity by dividing actual yearly earnings by weeks in the year (52). Thus, Worker B would have a compensation rate of $165.38 ($8600   52).

D. The Act Must Have a Realistic Statute of Limitations and Enforceable Notice Requirements In Order To Eliminate Stale Claims

The Act not only presumes all injuries and illnesses are work-related, but also requires employers to defend claims brought long after necessary witnesses and evidence have become unavailable. Although the Act presently contains three major limitations periods, these have been virtually read out by Administrative Law Judges, the Benefits Review Board, and the courts. Thus, the Act lacks a meaningful statute of limitations. Employers are without ability to predict liabilities or preserve appropriate evidence.

The Act's present time limits are a 30-day notice-to-employer requirement, 33 U.S.C. § 912(a); a one-year statute of limitations for filing a claim, 33 U.S.C. § 913(a); and a requirement that a request for modification of award be made within one year of a denial of a claim or last payment of compensation, 33 U.S.C. § 922.

However reasonable such time limits may appear, the fact is they are not enforced. Employers are held liable for injuries occurring years before a claim is filed. For example, the section 12(a) requirement that an employee give the employer written notice of an injury within thirty (30) days of the date of injury, or within thirty (30) days after the employee "is aware or . . . should have been aware of a relationship between the injury . . . and the employment," is made inoperable by section 12(d)(1). This provision excuses an injured employee from complying with the notice requirement if the employer has knowledge of the injury and has not been prejudiced by the claimant's failure to give notice. Exacerbating this problem, the Benefits Review Board and courts have held as long as the employer has "sufficient facts to conclude that compensation liability [is] possible. . .", the employer need not have actual knowledge of the injury.[5] Consequently, employees are immune from the requirement to give notice of injury. Many never do.

A recent Fifth Circuit decision is illustrative of the problem this immunity spawns.[6] The claimant worked two or three days a week as a rigger, and was also employed six nights a week as a gas station attendant. While performing his rigging work, he experienced severe shortness of breath and chest pains, causing his foreman to inquire about his health. Three days later, having done no rigging work in the interim, he suffered a heart attack. Although he never notified his daytime employer his heart attack was work-related, the court held the employer was "presumed to know," because the employee's shortness of breath had manifested itself at work.

In a case involving the District of Columbia extension of the Longshormen's Act,[7] a parking lot attendant went home one evening after feeling ill during the day. He never returned to work. He later filed a compensation claim alleging his employment had resulted in a mental breakdown. Although the Deputy Commissioner and the District Court ruled the employer had never received notice of the injury, the Court of Appeals held the employer "clearly had knowledge not only of the fact of [the employee's] illness but also of the fact that he probably became ill on the job."

---

[5] Leyden v. Capitol Reclamation Corp., 2 B.R.B.S. 24, 30 (1975), aff'd without opinion, 547 F.2d 706 (D.C. Cir. 1977)

[6] United Brands Co. v. Melson, 594 F.2d 1068, 1072-73 (5th Cir. 1979).

[7] Butler v. District Parking Management Co., 363 F.2d 682 (D.C. Cir. 1966).

Certainly, most people would not assume what appeared to be a non-occupational illness was a job-related mental breakdown. Most assuredly, few would suspect parking cars causes schizophrenia. It is apparent an employer must assume every illness is occupationally related.

Once knowledge of the injury is imputed to the employer, the employer can prevail under section 12(d) only if it can show it has been prejudiced by the employee's failure to give notice. Although the Benefits Review Board and the courts agree prejudice can be established if the employer can show it has been unable to investigate effectively the nature and extent of the alleged illness or provide medical services, the fact is the courts rarely find prejudice. In practice, therefore, employees are free, if not encouraged, to ignore the thirty day notice requirement.

The fate which befell section 12(a) has been duplicated by the way the Board and courts have construed section 13(a). They have emasculated 13(a) by allowing anything and everything to qualify as a claim. Employers must now defend against claims filed years after the alleged injury.

One court accepted as a formal claim a letter by the claimant stating he was injured but was released to go back to work and expected no damage to his injured hand. The formal claim was not filed until almost three years after the injury.[8/] Similarly, the Benefits Review Board held a letter asking the OWCP to send "all forms necessary to protect my rights" constituted a claim.[9/]

In another case, an employee's telephone call asking about "further entitlements" qualified as a claim because the OWCP staffer put a memorandum of the call in the file.[10/] The same court deemed section 13 satisfied by an Attending Physician's Report stating an employee was disabled "from

---

[8/] Peerless Insurance Co. v. Hill, 309 F.Supp. 189, 190 (D. Minn. 1969)

[9/] Crawford v. General Dynamics Corp., 7 B.R.B.S. 781 (1978).

[10/] McKinny v. O'Leary, 400 F.2d 371 (9th Cir. 1972).

3/17/71 - to date," even though the employee took no further action whatsoever.[11] It is difficult to imagine how a telephone call or a request for forms can be considered tantamount to a claim. Indeed, logic dictates the conclusion should be the opposite; that is, after receiving the forms and considering the merits of the claim, the employees changed their minds and decided not to pursue their claims.

With sections 12 and 13 in their present posture, employers frequently have no choice but to voluntarily pay compensation for the stalest claims. It is futile to litigate timeliness when claimants need only point to phone calls or medical reports in order to prevail. The futility of defense is compounded since witnesses become increasingly difficult, if not impossible, to locate as time passes. Given the section 20 presumption, employers are stripped of defenses.

We propose the Act should provide that a "claim" within the meaning of section 13 must be filed on a form prescribed by the Secretary and, within a prescribed period of time, must be forwarded to the Employer.

11/ Walker v. Rothschild International Stevedoring Co., 526 F.2d 1137 (9th Cir. 1976).

S. 1182 does correct a shortcoming in section 30(f). Section 30(f) now provides the period for filing a claim does not begin to run until the employer files a Report of Accident or Injury. Much case law imputes greater knowledge of a claimant's condition to the employer than to the claimant, and employers are forced by these Board and court decisions to report every occurrence rather than risk tolling. The Nickles-Nunn bill remedies this problem by making clear the reporting requirement in Section 30(f) arises only when the employer knows an injury is claimed to have been caused by the employment.

The third limitation period, which applies to requests for modification of awards, clearly provides that an employer who makes payments voluntarily will be free from the spectre of additional liability one year from the date of its last voluntary payment. Although section 22 seems unambiguous, the Supreme Court has ruled the limitation applies only to the Deputy Commissioner's power to modify a previously entered order.[12] Thus, if an employer makes payment voluntarily, and a formal order is not entered, the one year time period never begins to run. The Claimant is free to demand additional compensation years later.

---

[12] Intercounty Construction Corp. v. Walter, 422 U.S. 1 (1974).

There is no rationale for requiring employers to obtain formal orders recognizing voluntary payments. We propose this problem be remedied by adding a provision to section 22 requiring a modification petition be filed within one year of the last compensation payment, whether or not the payment was made pursuant to an order.

E. Medical Services Must Be Provided In A Reasonable And Controlled Manner

Section 7 of the Act imposes a basic obligation on employers to furnish and pay for necessary medical treatment, including doctors' fees, hospital costs, medicine and any needed apparatus, for as long as the nature of the injury or the process of recovery requires. This section, as amended in 1972, has led to excessive medical costs, lack of control over time-loss from injuries, and "physician shopping."

Under the 1972 amendments, employees have been given the right to select any physician of their choice, regardless of the physician's qualifications or experience in treating industrial injuries or diseases. The responsibility for overseeing medical care and for policing abuse of the section is placed in the hands of the Secretary. The Secretary has discretionary authority to designate a list of qualified physicians from which employees may choose; to insure adequate medical care and compliance with the reporting requirements for treating physicians; and to enforce, through suspension of compensation payments, the right of the employer to have an independent medical examination performed by a physician of its own selection.

The scheme envisioned in the 1972 amendments places an unrealistically heavy burden on the Secretary. It has not and cannot be met without a massive increase in bureaucracy. The system has led to abuse by claimants both through the over-use of specialists and "physician shopping." At the same time, claimants are free to resist independent medical examinations by physicians selected by the employer. The scheme serves to encourage lengthy recovery periods and repetitive referrals, without any serious oversight or quality control and without any corresponding increase in medical benefit. To function effectively, the provisions of section 7 relating to oversight and enforcement should be tightened, with a sharing of responsibility between the Secretary and the employer. The employer, as the party responsible for payment of not only the medical bills, but also the injured employee's compensation, has a natural interest in enforcing the provisions of the Act. Employers wish to insure quality, but cost-effective, medical care.

1. S. 1182 Insures Treatment by Qualified Physicians and Discourages Physician Shopping.

Senator Nickles cited section 7 as the one provision of the Longshore Act which has allowed the greatest opportunity for abuse.[13] While employees are supposedly restricted in their choice to physicians "authorized" by the Secretary, the Secretary has effectively authorized any and all health care personnel, without regard to their qualifications or the propriety of the authorization. Section 7 thus allows employees to select physicians who may not possess appropriate qualifications to treat industrial injuries and disease. It penalizes employers and the public by allowing less scrupulous employees to "physican shop" at the employers' expense. In addition, absent intentional "physician shopping," there is a tendency for family practitioners -- who are most likely the first physicians contacted by employees, to obtain additional opinions. It is not unusual for five or six specialists to be consulted. Escalation of medical costs in such a situation is not difficult to imagine.

---

[13] 127 Cong. Rec. S5076 (daily ed. May 14, 1981) (remarks of Sen. Nickles).

S. 1182 cures this problem by returning to the pre-1972 concept of a specialized panel of physicians. Under this scheme, the employer, subject to the approval of the Deputy Commissioner, is allowed to select a panel of qualified specialists experienced in industrial medicine. This system insures treatment oversight and quality care while preserving free choice, albeit confined to the approved panel. Further, the system would allow employers relief from excessive medical costs by requiring referring physicians to provide the employer and the Deputy Commissioner with a written statement of the reasons for referral. This should curtail excessive referrals and "physician shopping." In addition, this approach should serve to encourage employees to return to work when able rather than pursuing excessive recovery.

2. Oversight of Medical Treatment Must be Insured by Mandatory Physician Reporting Requirements.

Under the current Act, the Secretary is entrusted with the "active supervision" of each injured employee's medical care. In addition, physicians are required to file reports describing the injury and treatment with the employer and the

Secretary as a pre-condition to payment. This requirement is rarely enforced. The Secretary does little to supervise medical care. Indeed, it is unrealistic to expect adequate oversight by the Secretary without the addition of a massive bureaucracy. Section 7 fails to provide either employers or the Secretary with control of the quality or the course of medical treatment. These faults exacerbate the problems of excessive medical costs, lack of adequate oversight, and overly lengthy recuperative periods.

A preferable and more effective system of oversight is provided by S. 1182. The bill imposes a mandatory detailed reporting requirement for physicians as a prerequisite to payment. Under S. 1182, the Secretary's role is limited to ensuring that attending physicians file prompt, complete reports of all medical treatment, including the reasons for, and the results of, any referrals made. Currently this rests with the discretion of the Secretary. This scheme will improve oversight, help eliminate excessive referrals, and limit inapproriately lengthy recuperation.

3. S. 1182 Should Mandate a Termination of Compensation When an Employee Refuses to be Examined by an Employer Selected Physician.

Abuse within the current scheme results from the medical examination requirements. Both the Act and S. 1182 give the

Secretary discretionary authority to suspend compensation if the employee "unreasonably" refuses to submit to a medical examination by a physician selected by the employer. Seldom, if ever, is this provision enforced. Instead, employees are permitted to resist examination while receivng full compensation.

The provision must be modified to require employee cooperation as a condition not only to continued compensation, but also to the payment of medical costs and attorneys' fees. Without claimant cooperation, employers are left incapable of assessing claimant's medical condition. Compensation proceedings then can become unnecessarily prolonged. We recommend the following modification be made to Section 7(d):

> (3) If an employee at any time unreasonably refuses to submit to medical or surgical treatment, the deputy commissioner shall suspend the compensation proceedings and compensation payments. If an employee at any time refuses to submit to an examination by a physician selected by the employer the deputy commissioner shall suspend the compensation proceedings and compensation payments within fifteen days of the date on which the deputy commissioner is notified of such refusal. If compensation proceedings and payments are suspended under this paragraph, the employer shall not ever be liable for penalties, attorneys' fees, or for compensation payments that would otherwise have been payable for the period of the suspension.

F. S. 1182 Will Help Eliminate Unnecessary Injuries By Barring Compensation For Employees Who Intentionally Falsify Information on Pre-employment Medical Histories

The present Act fails to discourage job applicants from misrepresenting their medical histories. It contains no explicit sanction against claimants who falsify employment applications by concealing prior injuries or medical conditions which predispose the applicant to subsequent work-related disability. Falsification of employment applications unfairly burdens employers with otherwise avoidable compensation costs. Moreover, it poses an unnecessary danger of injury to the employees. Section 3 of S. 1182 will eliminate the unpredictable costs to employers associated with the falsification of pre-employment records. It bars compensation when there is intentional misrepresentation.

Employers are now obligated to take employees "as they find them" -- *i.e.*, with all of the risks attendant to their condition at the time of hire. Regardless of an employee's pre-existing condition, employers are fully liable for all workplace injuries. The only means open to employers to protect employees from job assignments which may exacerbate existent infirmities, and thereby to protect themselves from needless liability, is through the pre-employment process. Without full disclosure by applicants of physical and medical conditions, employers cannot safely place applicants. Totally comprehensive pre-employment physicals are impractical. Moreover, the risks associated with X-rays prohibit all but essential use of this diagnostic tool.

Currently, employers are held liable for all injuries even though some would have been prevented had employee disclosure of pre-existing infirmities been encouraged. One Council member was recently ordered to pay compensation to an employee who concealed prior hand and back injuries at employment. The compensated injury was contributed to by the concealed pre-existing hand and back injuries. The Administrative Law Judge found: (1) the claimant had knowingly and willfully misrepresented his physical condition, (2) the shipyard had relied upon his misrepresentations in its decision to hire him, and (3) the undisclosed back injury and the new injury were causally related. Although recognizing the claimant would profit from his own fraud if allowed to collect benefits, the Judge felt constrained to award compensation on the ground the Longshoremen's Act does not expressly provide for a misrepresentation defense. The Judge noted as follows:

> I believe that when an Employer attempts to obtain accurate information from a prospective employee regarding his past medical history, only to receive false and misleading

> data, the Employer should not be required to assume a heavy financial burden for an injury casually [sic] related to a prior medical defect concealed from the Employer by the employee. The Employer never intended to assume such a risk. The purpose of the job application and the medical questionaire is to screen prospective employees and to find those most suited for particular jobs. It's quite possible that if the Employer, in this case, had known of the Claimant's prior injuries it would have placed Claimant in a different job, rejected him or even placed him in the same job. In any event, it would have had a choice, an opportunity to make a considered judgment. In a situation such as this, it is the wrongdoer who should suffer and not the innocent party.14/

As construed in this decision, the Act presently leaves the employer without recourse against the fraudulent claimant. Section 31 does not apply, since the claimant's falsification was made only in an effort to obtain employment, not compensation benefits. Even if section 31 applied, the possibility of criminal prosecution would be of limited consolation to an employer forced to pay benefits fraudulently secured. Finally, Section 31 appears not to be a subject for Administrative Law Judges, or so they would have us believe. Thus, fraud cannot be raised by the employer in compensation proceedings.

14/ Hall v. Newport News Shipbuilding and Dry Dock Co., Nos. 79-LHCA-1204 and 79-LHCA-1205, (ALJ Nov. 13, 1979).

The availability of section 8(f) relief (the Second Injury Fund) will not remedy the employee's wrongdoing. Section 8(f) applies only if both the prior and present disabilities are permanent, and the prior condition was manifest. Then, too, an employer who wins 8(f) apportionment is still liable for two years of benefits. Then the liability resulting from fraud is spread to _all_ covered employers.

Section 3 of the Nickles-Nunn bill removes the burden of fraud from the employer and places it where it belongs, on the wrongdoer. Under Section 3, misrepresentations in the pre-employment process will bar compensation where the fraud was intentional, was relied upon by the employer, and was causally related to the second injury. This is the formulation recognized by Professor Larson in his treatise[15/] and in decisions applying the workers' compensation laws of Tennessee, Florida, Kentucky, Delaware, South Carolina, Wisconsin, Arkansas and Nebraska.

This provision would not, of course, penalize every employee error in the pre-employment process. An innocent misstatement would not fit the formulation, nor would a misrepresentation that had no contributing effect upon the later

---

[15/] 1B A. Larson, _The Law of Workmen's Compensation_, § 47.53 (1979).

injury. Once the employer had independently learned of the employee's true condition, moreover, it would not have relied on the misrepresentation within the meaning of section 3.

G. The Act Imposes Unjustifiable Administrative Burdens That Are Partially Remedied By S. 1182

The present Act imposes impractical filing and record-keeping burdens on employers that add little to the protection of injured employees and subject even the most conscientious employer to substantial penalties. While excusing virtually every administrative failure on the part of claimants, the Act holds employers to rigid and utterly unrealistic deadlines.

Perhaps most burdensome is the requirement that medical reports be filed each time an injured employee is treated. As interpreted by one Deputy Commissioner, the Act requires one Council member to submit new medicals each time an employee reports to its clinic for therapy and rehabilitation. No one disputes the OWCP should be kept informed of the status of occupational disabilities. In 1980, however, this member recorded between 65 and 70 thousand clinic visits, each of which, no matter how routine, arguably had to be reported to the Deputy Commissioner. Although much of this reporting adds little to the OWCP's ability to monitor treatment, it requires thousands of hours of work on the part of medical, clerical, and claims personnel. Surely a periodic update to OWCP would be equally informative and yet save employers millions of dollars each year. Accordingly, we propose section 29 be amended to require employers only to maintain a record of injury available for inspection by the Deputy Commissioner upon advance notice to the employer.

Similarly troublesome is the need for employers to file notices of controversion when none seems necessary. Employers may be penalized, after making voluntary payment for loss of hearing, if the formula for measuring occupational hearing loss changes. As a matter of policy, one of our members is forced to file notices of controversion in every single hearing loss case; in 1980, nearly one thousand additional forms were filed merely to protect that shipyard against this unforeseeable liability.

While some of the recordkeeping requirements under the Act serve legitimate informational purposes, their sheer volume creates an administrative nightmare for the employer. One Council member faces an average of 9000 new injuries each year. Each such injury requires the completion, filing or review of most or all of the following "laundry list" of OWCP forms:

LS-1	Request for Examination and/or Treatment
LS-18	Pre-hearing Statement
LS-19	Certificate of Filing and Service
LS-20	Letter Transmitting Decisions of Administrative Law Judges
LS-141	Notice of Informal Conference
LS-201	Notice of Employee's Injury or Death
LS-202a	Employer's First Report of Injury or Occupational Illness (Short Form)
LS-202	Employer's First Report of Injury or Occupational Illness (Long Form)
LS-203	Employee's Claim for Compensation
LS-204	Attending Physician's Supplementary Report
LS-205	Physician's Report on Impairment of Vision
LS-206	Payment of Compensation Without Award
LS-207	Notice of Controversion
LS-208	Notice of Final Payment or Suspension of Compensation Payments
LS-210	Employer's Supplementary Report of Accident or Occupational Illness
LS-215a	Notice to Employer and Insurance Carrier That Claim Has Been Filed
LS-215	Answer to Employee's Claim for Compensation
LS-216	Request For Additional Reports
LS-222	Carrier's or Self-Insurer's Report on Rehabilitation to Deputy Commissioner
LS-240	Certificate That Employer Has Secured Payment of Compensation

LS-260	Notice of Death
LS-262	Widows, Widowers and/or Children's Claim For Death Benefits
LS-263	Other Dependent's Claim For Death Benefits
LS-265	Certification of Funeral Director's Burial Expenses
LS-274	Report Of Injury Experience
LS-464	Compensation Order (Scheduled Awards)
BEC-463	Compensation Order (Loss of Wage Earning Capacity)
LS-465	Compensation Order (Settlement, Section 8(i)(A).
LS-471	Application for Approval of Agreed Settlement - Section 8(i)
LS-512	Request To Employer For Form 202
LS-513	Report of Payments (Second Injury Fund)
LS-521	Notice To Employer/Carrier and Payee/ Beneficiary of Annual Adjustment In Weekly Compensation Rate
LS-548	Request to Employer For Explanation Of Late Filing of Form LS-202
LS-838	Rehabilitation Follow-up Letter
LS-839	Rehabilitation Action Letter

The difficulty an employer experiences in keeping abreast of all this recordkeeping should be obvious. More burdensome, though, are the rigid time limits employers must meet in filing such records. Under section 14(f) of the Act, an award of compensation must be paid within 10 days of its filing with the OWCP. Payment of compensation, moreover, has been construed to mean actual receipt of the money by the claimant, not merely its mailing by the employer.[16] Recently, an administrative law judge awarded the 20% statutory penalty for late payment even though the employer's carrier mailed a check to the claimant eight days after entry of the order. The postal service did not deliver it to the claimant until the thirteenth day.[17] An employer has no way of verifying the filing date listed by the Deputy Commissioner, moreover, and is thus at the mercy of the OWCP staff. Often, 4 or 5 of the employer's 10 days pass before it receives an order. Indeed one of our members recently received an order -- mailed no more than 20 miles away -- eight days after its filing. This procedure leaves compensation clerks little time to perform a multitude of administrative tasks before getting checks in the claimant's hands. The Nickles-Nunn bill remedies this prcolem by giving employers 15 days to postmark payments and by beginning that period only when the employer has actually received the order.

---

[16] McKamie v. Transworld Drilling Co., 7 B.R.B.S. 315 (1977).

[17] Thompson v. Transoceanic Terminals, 10 B.R.B.S. 1 (ALJ 1979).

Equally difficult to meet is the 14-day limit for the filing of a notice of controversion. This requirement affords employers little opportunity to investigate questionable claims. The requirement also does little to encourage voluntary payment of meritorious claims. Employers are more likely to automatically file notices of controversion, just to protect their rights. Accordingly, both employers and claimants will be served if this time limit is extended.

We suggest another burdensome time limit be addressed. Employers who decide to pay compensation without an award must make first payment within 14 days, even though much necessary information may not be available. This forces employers to begin paying installments at the federal minimum and then adjust the compensation rate by filing another form. Because the employer is hurried, the injured employee must temporarily accept lower benefits. Certainly, this unnecessary inconvenience can be eliminated.

H. In Order To Discourage Fraudulent And Frivolous Claims, S. 1182 Should Be Amended To Require Costs And Attorneys' Fees Be Awarded To Employers Defending Such Claims.

There are presently no means for an employer to recoup its losses in defending itself against fraudulent or frivolous claims. In addition, an employer who voluntarily pays a claimant compensation but later finds out the claim was completely without merit cannot recover the payments. These two factors add to the incentives of employees to file false compensation claims.

Section 26 of the Act authorizes a "court" to assess costs against a claimant if it determines "the proceedings in respect of such claim or order have been instituted or continued without reasonable ground . . . " The language of the provision is deficient in at least two respects. First, because the section mentions only the authority of courts to provide relief, it is unclear whether an Administrative Law Judge has the power to award costs. In fact, most Administrative Law Judges have refused to consider or act on such requests, and, to our knowledge, none has ever granted a request for section 26 relief. Because the Administrative Law Judge hears the evidence and weighs the witnesses' credibility, however, it is logical that the judge make such a determination.

Second, Section 26 specifically allows an employer to recover only the "costs of compensation proceedings" when a meritless claim is instituted. It is unclear from this language whether an assessment of costs would include an award of reasonable attorneys' fees. Ordinarily, however, a recovery of costs without attorneys' fees would be an empty victory and the threat of such an assessment would offer little disincentive for an employee to file a meritless claim.

One of our members was involved in a case that clearly demonstrates the need for mandatory application of section 26. An employee who had previously injured his back in the service sustained a slight strain to his back at work. The employee thereafter quit his job and filed a compensation claim, asserting that he was permanently and totally disabled as a result of this strain. All the medical evidence in the case demonstrated there was nothing wrong with the claimant; indeed, the employer introduced video tapes of the claimant playing basketball and participating in other strenuous activities. All were totally inconsistent with his allegations of pain and disability. When presented with this evidence before the hearing, the claimant's attorney requested and was granted permission to withdraw from the case. The claimant proceeded with the case on his own, and ultimately appealed the denial of his claim to the Benefits Review Board, to a United States Court of Appeals, and to the Supreme Court. Although the Board and the Court of Appeals affirmed the Administrative Law Judge, and the Supreme Court denied certiorari, the employer had incurred thousands of dollars of unrecoverable attorneys' fees. Having proceeded on his own, the claimant, on the other hand, had nothing to lose by pursuing his frivolous claim through several levels of litigation.

To remedy these two deficiencies in the Act, the Shipbuilders Council proposes that Section 26 be amended to read as follows:

> If the administrative law judge, Benefits Review Board or court having jurisdiction of proceedings in respect of any claim for compensation or benefits concludes such proceedings have been instituted or continued without reasonable ground, the costs, including reasonable attorneys' fees, of such proceedings shall be assessed against the party who has so instituted or continued such proceedings.

By increasing the risks that frivolous litigation would entail, this section would help deter employees from filing fradulent claims and unmeritorious appeals.

The language also makes clear application of Section 26 is mandatory. Even the few Administrative Law Judges who presently pass on an employer's request for costs are reluctant, at best, actually to award a penalty, even though Section 26 provides that costs "shall be assessed" in appropriate cases. In fact, as already noted, none of our members is aware of a single case in which an Administrative Law Judge has taxed costs against a claimant. Strengthening these provisions as proposed will be a signal that relief under Section 26 is not to be unreasonably denied when a fraudulent claim is filed.

I. S. 1182 Should Not Create An Additional Unnecessary Bureaucracy By Establishing An Office Of Second Injury Fund Custodian.

The Second Injury Fund, 33 U.S.C. § 908(f), limits an employer's liability to 104 weeks of payments when an objectively ascertainable pre-existing impairment combines with a work-related injury to render an employee permanently disabled. The Shipbuilder's Council feels it is unwise to create an additional bureaucracy by establishing an Office of Custodian of the Second Injury Fund, as proposed in S. 1182. All S. 1182 really suggests is the addition of more bureaucrats to the system, for it is certain no single individual, or uniformly administered group of individuals, would be able to "defend" the Fund nationwide. Moreover, such Fund representatives will duplicate activities and responsibilities of the Director of the Office of Worker's Compensation Programs. Such additions to the bureaucracy certainly run counter to the administration's desire to cut government spending.

Some industry groups complain the Fund is being abused through overuse. They contend the rapidly escalating cost of the Second Injury Fund assessment results from such overuse.

However, the plain fact is escalating Special Fund assessments flow from a single source - the aggregate of abuses employers experience under the Act. Eliminate the abuses and you relieve pressure on the Fund.

Make medical care subject to tighter employer control. You thereby lessen the opportunity for spurious assignment of disability.

Make rehabilitation mandatory. You thereby reduce recovery periods.

Eliminate indexing. You thereby stop escalation of costs.

Provide coverage only for those who cannot be covered by state laws. You thereby remove tremendous potential liabilities resulting from the shipbuilding industry being inadvertently swept into the purview of the Act in 1972.

Remove benefits for death from unrelated causes. You thereby eliminate costs which have nothing to do with wage replacement.

Provide benefits for permanent disabilities only during normal working years, not for life. You thereby remove a temptation to supplement retirement benefits through compensation.

Repeal the presumption under which virtually every malady of life can be construed to be work related. You thereby return the Act to its original purpose -- wage replacement for occupational infirmity.

Provide clear direction to the Office of Workers' Compensation Programs, Administrative Law Judges, Benefits Review Board and Courts through specific amendatory language so they will clearly knows the Act is intended to compensate occupationally sick and injured workers, and it is not a social welfare/life insurance system.

Senator **Nickles**. Thank you for that comment and for the other suggestions that you have, because I have been seeking those, and we will certainly scrutinize them, particularly the last one.

Mr. Niles, you were wanting to show us your presentation on the chart.

Mr. **Niles**. Mr. Chairman, if the committee would find it helpful, we have included in evidence, for purposes of the record, what has been identified as a typical shipyard. It is typical in the sense that it embraces each of the components that you will find in any shipyard, irrespective of large or small.

As a consequence, we are attempting to provide the type of information which some witnesses have complained has not been provided to this committee.

If the Committee will note, the first page is administration. Everyone agrees that administration is not covered under the act at present.

As we go through this, it is important to note that the shipyard fabricating process is no different than a large industrial site—albeit a railroad boxcar site, an automobile fabricating facility, a trailer home facility—and the components are all the same, until you get to one point.

The next page—page 2—is storage and maintenance. There is nothing unique to storage and maintenance which is maritime in nature, and that has been so noted by the courts. So storage and maintenance should not be covered under the act as a maritime issue.

The third area—page 3—covers areas wherein there is shop work. The work done in these shops, by machinists, electricians, pipefitters, and others uses the same skills, uses the same tools, uses the same equipment and machinery again that would be found in similar, comparable heavy construction and heavy manufacturing process. So again, we would suggest that there is nothing maritime about workers in those particular areas.

The next area—page 4—which is noted in green is subassembly. In the subassembly area, components are taken from various shops and put together. Again, nothing looks like, even in small part, anything which is maritime in nature. The same type of components may go into boilers, may go into steel beams and girders that would go into bridge construction, and various other components found in construction which is unrelated to maritime employment.

The next area—page 5—is the erection area. Every yard has an erection area or a buildingways area. In the buildingways area, these components, these elements come together. Now, some shipyards are so small that they have their building place under a roof, inside a shop. Other yards, depending upon the type of work, have a large, open buildingway area. In small facilities, the work appears as assembly line fabrication inside a plant. In large facilities, the work looks like construction of appartment buildings. Again, there is nothing in this area, as has been defined by the courts and commentators, which is maritime in nature.

So what we boil down to is the last page, and that last page is the outfitting area. Outfitting work is done exclusively over water. It has always been done over water. As was noted today, when you lay the keel of a wooden ship, it was over land, and it was after that ship was ready for launching that you launched the vessel, and you outfitted it over water. It was done way back in the sailing days, in the days of our forefathers. It is done essentially the same today, although we are obviously using entirely different components and different technology.

The work over the water in an outfitting area, represents no more than 15 to 20 percent of the entire work force. And only those workers would be working in the outfitting area. Generally, these fellows work in crews, in gangs. They do not, for example, work over the water in the morning and on land in the afternoon. They are assigned to a work location and they work that work location for a long, designated period of time.

The only reason that we are required to suggest that should be covered over water is because of the U.S. Supreme Court decision saying that ship repairmen have to be covered over water. You could come in, Mr. Chairman, if you wanted to, and legally say, "We are going to take out shipbuilders engaged in new construction over water; we are going to cover them under state workmen's compensation," and they would be so covered in every State in this Union. And there is no legal constitutional reason why the Longshore Act has to provide coverage to that class of worker. That would again reduce the class of workers over the navigable waters to a much more significant sum.

Again, I would like to entertain questions on this and provide further amplification. I am attempting to abide by the time constraints. I apologize for running on unduly long.

Senator NICKLES. Thank you, Mr. Niles.

Earlier estimates were the 1972 amendments increased the coverage of workers' compensation anywhere from 150,000 to 200,000 people. If S. 1182 is enacted, how much do you think that would reduce coverage? Would that pull us back to 800,000?

Mr. NILES. To my best recollection—and this could be supplied by the appropriate people in the Shipbuilders' Council—I believe that the most recent court order indicated there were 172,000 shipyard workers engaged in the private sector. What we have suggested to the committee is approximately 80 percent of those who work on land would be covered under State workers' compensation; the 20 percent that work over the water, in the outfitting areas, would continue to be covered by the Longshore Act.

Senator NICKLES. You are talking about shipbuilding alone?

Mr. NILES. Shipbuilding, shiprepairing, and shipbreaking.

Senator NICKLES. The majority of people covered by this act are stevedores, or working for stevedores, longshoremen, et cetera.

Mr. NILES. No. I beg to differ, Mr. Chairman.

Senator NICKLES. Please do.

Mr. NILES. There is a misconception about that.

Senator NICKLES. How many people do you think would be covered by the act—that is what I am searching for.

Mr. NILES. Total number?

Senator NICKLES. Yes.

Mr. NILES. I would like to supply that in a written number. The Department of Labor has these statistics, and clearly, the shipyard workers engaged in the private sector and those engaged in the public sector, in the naval shipyards, comprise an overwhelming majority of workers who are covered under this act, as compared to longshoremen.

Senator NICKLES. I would very much appreciate those estimates for the record, the number who are covered now, broken down by category, and what the estimates would be should S. 1182 become law as written, with the definition as written.

Senator Williams brought out a point that, Mr. Niles, you touched on, and maybe you could help clarify. What about the guidelines as to where does one cross the boundary between being under State and being under longshore?

Mr. NILES. Well, as was pointed out by the Supreme Court in the *Calbeck* decision, and as was reviewed on by the commentators and those who are knowledgeable from the legal standpoint and those who are knowledgeable in the shipyard business, the water's edge—because no work is done at the water's edge. Vessels which are moored beside the water. So there is always some distance, there is always some gap.

The election of remedies doctrine, developed in the 1940's, well before the *Calbeck* decision—and it was in place when the Supreme Court looked at this in 1960—clearly, from reading the *Calbeck* decision, you can see throughout the fabric of the decision, that the intent was to allow the employee who was aboard a vessel and fell on land, or claimed that he had cumulative trauma, to allow that individual to come in and demonstrate that he came under both acts. The employee is able to elect one act versus the other act—if that is done, and it is set up in this fashion, we avoid a tremendous amount of duplicity in terms of administrative costs, lawyers' fees that do not go to the claimant and that both sides have to bear unnecessarily——

Senator NICKLES. If this legislation were passed, is that your interpretation of what would be the case? An employee, let us say, as was referenced by somebody else, somebody who was driving the forklift on and off the ship. This hour he is on, this hour he is off—on and off all day—that if he were injured, or let us say he had a cumulative back problem or something like that, he would be able to select which coverage he would be under?

Mr. NILES. Mr. Chairman, in my haste, I failed to mention that to reinforce this doctrine, there should be placed in the act a section dealing with election of remedies, as well as a correction noted in paragraph 905(b) in order to get rid of the third-party liability claims. Those are the two amendments that I would propose in conjunction with our testimony that are very consistent with the purposes of the bill as presented.

Senator NICKLES. Would you give those to us in writing, so we can consider those at the time?

Mr. NILES. Yes, sir.

Mr. MCELVEEN. Mr. Chairman, if I might comment just a little further from my experience at the Newport-News Shipyard, because you have had some testimony from the Steelworkers in this regard. It has been my experience in trying literally hundreds of these cases and examining the work activities of a large, large number of employees, that given the example of the welder, which we talked about a little earlier, that the vast, vast majority of the welders are either engaged in shoreside activity or in ship activity.

There are a few welders who change positions periodically, but what you will find in those situations is that a welding job will take place aboard a ship and that that job will take anywhere from a few days, perhaps, even to a few weeks, in which those individuals will constantly be coming onto the work shift, going onto the ship for the entire shift, coming off the ship, and the shift, and going home. And the fact of the matter is that in shipbuilding, you do not have this constant movement back and forth from the ship to the shore in activities such as loading or unloading. The modules are built on the shore, and then they are lifted by cranes down into the drydock or the shipway areas for construction process taking place in the drydock or the shipway, and the individuals who are welding those units together, for example, will start their shift and finish it on that ship, and only at the time that job changes will they actually change and perhaps go to another ship or, under some fairly rare circumstances, come ashore.

There is just not that kind of interplay in the shipbuilding industry that you have in movement in the longshoring business. And of course, the longshore portion of this statute from a definitional standpoint covers the individual who would be hurt coming up or going down a gangway, because their definition, as I understand it, provides that coverage extends to the first shoreside point of rest, which is beyond the gangplank, obviously.

Senator NICKLES. Thank you.

One other quick question. Mr. Hood, you mentioned, I believe, $9 million was the additional cost—$9.5 million for building a submarine or something, extra because of the Longshore Act?

Mr. CLARKSON. That was the aircraft carrier, the *Vinson*.

Senator NICKLES. The aircraft carrier, *Vinson*, cost an extra $9.5 million because of the Longshore Act?

Mr. CLARKSON. That is correct?

Senator NICKLES. As compared to what, State compensation or Federal?

Mr. CLARKSON. That was the total amount of comp costs in that one vessel. That was substantially all Federal cost, as you can see. The ratio of Federal to State can be roughly drawn from exhibit C, where you see the breakdown in the yard during the period 1972 through 1981, and the ratio would be about the same as State claims to Federal claims, in terms of the breakdown of the $9.5 million.

Senator NICKLES. Senator Williams brought out a point that I would just like to touch on. This act should possibly be called the "Lawyers' Compensation Act" or something similar. I am concerned that it already is.

What is the average attorneys' fees for compensation claims that are going before the administrative law judges? Do you have a fixed percentage?

Mr. WELCH. Senator, our experience is, first of all—and to put it in perspective, I am not a lawyer, and I am forced to pay not only the defendant claims, but if in fact we lose, I have to pay the claimant's attorneys' fees. In 1980, I paid claimants' attorneys' fees $374,000. And the way the act is written, if they prevail in an amount of, say, increasing disability by 1 percent, the administrative law judge will award attorney's fee. In that particular instance, the attorney increased the employer's compensation by about $1.80 a week, or a 1-percent increase in disability, and was awarded an attorney's fee, I think in the vicinity of $2,500 or $3,000.

Senator NICKLES. How much was actually paid out in benefits? Here is an individual who hurts his arm, and he says, "I have lost 25 percent use of my arm." He receives a permanent partial disability, and he receives a lump sum payment, let us say, of $40,000. How much is the attorney's fee on that? Can you help me, Mr. Niles?

Mr. NILES. Perhaps, Mr. Chairman. I would think that if those statistics are maintained, they would be maintained either by the office of administrative law judges or the benefits review board, and I would suggest that the committee could possibly get the information there. We will endeavor to obtain it, because each order would indicate whether or not the employer would have to bear the attorney's fees for the claimant, and in any event, the order would still establish at the litigation level the attorney's fees for the claimant's attorney.

Now, any attorney's fee that is requested by the claimant's attorney before the Deputy Commissioner would have to be established back at the Deputy Commissioner's level, and that would not show up in a compensation judgment or settlement at that point. But these would seem to be the two best repositories for that information.

Senator NICKLES. In Oklahoma, in their workers' compensation, I think there is a fixed fee of 10 or 20 percent. Is there a standard that is more customary or something?

Mr. NILES. There is no fee that is established by percentage. It is an hourly rate. The rate varies from jurisdiction to jurisdiction; it varies from administrative law judge to administrative law judge. It is difficult to predict.

Senator NICKLES. Let me ask you another question. When we see areas such as the New York/New Jersey ports that are receiving premiums that high, evidently that means there are some benefits that are going out at unbelievable rates. I think one of our witnesses earlier today said that the payments went from $33 million in 1972 to $215 million in 1980. I am wondering how much of that $215 million went to attorneys and not to the employees—and I will research this to find out.

Senator Williams.

Senator WILLIAMS. Yes, if I could, Mr. Chairman. The last Supreme Court expression on the jurisdictional question came before the 1972 amendments. Was that *Nacirema?*

Mr. NILES. Yes, sir, that is correct. In that decision, the Justice writing for the Court indicated that an invitation to extend jurisdiction shoreward must be taken to the Congress. But the Court noted at the same time that if jurisdiction were to be extended shoreward that it would create the same confusion which had previously existed before the Court clarified jurisdiction in the *Calbeck* decision in 1960. And I think, if you will give me just one second, I may have included a portion of that in my statement. That is correct. If you look at page 21 of my statement, Justice White, speaking for the Court, indicated that if you moved the line shoreward, you would perpetuate on the landward side of the Jensen line—and that is the water's edge doctrine—the same confusion that previously existed on the seaward side of the Jensen ~~line~~; that is, when jurisdiction was not uniformly running right down the water's edge concept.

So the Court noted at that time that it did not have the power. Congress did, but at the same time, Congress was getting into a morass of problems if it did go shoreward.

Our complaint as shipbuilders is that review of hearings conducted in 1971 and 1972 demonstrates lack of considered study of the impact of shoreward extension of jurisdiction for the shipbuilding community, for shipbuilders. The entirety of the inquiry at that time was with regard to shoreward extension for the stevedoring/longshore industry. And the concepts that are important there are not important with regard to our particular industry, Mr. Williams.

Senator WILLIAMS. Well, if we could get your observations on the *Nacirema* kind of factual situation that so seemed to offend the Court—there, the workers were on a pier, as I understand it, and an aberrant crane knocked them off. Some were thrown to land, some were thrown into the water. Those who were thrown to land went State; those in the water went longshore. Is that right?

Mr. NILES. Well, first of all, this is a longshore case. It does not deal with shipbuilders.

Senator WILLIAMS. That is right, and that is why I know we are a little beyond your field, but you seem to have a pretty broad comprehension of the subject matter. So I would ask you, with the proposal before us in the bill, how would that particular situation be handled?

Mr. NILES. I think clearly——

Senator WILLIAMS. Would we go back to the guy that hit land goes under State, and the guy——

Mr. NILES. If he was on a pier, piers have always been considered under the act as to be exclusive stateside jurisdiction. So if he was on a pier and he landed on land, he only had a landside issue, because piers before 1972——

Senator WILLIAMS. The pier runs out over navigable water. Let's put that in.

Mr. NILES. Yes, sir. A pier running over navigable water has always been deemed by the courts to be an extension of land. And irrespective of how far it ran, the court said it was an extension of land, State compensation applied, and the Longshore Act did not apply—prior to 1972.

So if he was on a pier and he fell on land, he only had a landside claim.

Senator WILLIAMS. Even though he landed in the navigable water?

Mr. NILES. No, that is the next step. If he was on a pier, and he fell into navigable water, then it would give rise for him to make an election of remedy; for him to decide whether he would get Federal or State. But it would avoid the duplicity problem that we have currently. It avoids the concurrent problem that we are confronted with at this time.

Mr. CLARKSON. You would take the lawyers out of it?

Mr. **Niles**. You would take the lawyers out of it, and you put the right where it belongs; you put it in the hands of the injured worker. He sits down with his attorney and he says:

> Look, here are my rights under state law, and here are my rights under the Longshoreman Act. I am going to decide which is best for me.

And as a matter of fact, in the jurisprudence that developed between the forties and before 1972, that election was only final when the employee got a final judgment in one form or the other. So that there was, in some instances, some duplicity. But the practice back then was to make a decision early and go one way or the other early in the ballgame. Election of remedies preserves the employee's rights, and since the Congress did not speak to the issue, we are inviting the committee to do so at this time.

Mr. **McElveen**. But Senator Williams, if I may interrupt just a second and say that in the Nacirema situation, the present bill provides that in longshoring activities, the shoreside point of rest is the point beyond which State remedies take over, and if in fact that individual were knocked from the ship onto a pier that was seaward of the point of rest of cargo for that particular unloading process, he would in fact still be covered, even though he hit the pier, under the Longshoremen's Act.

It seems to me pretty incredible to think that employers would move that cargo right to the very tip end of a pier and say, "Here is the point of rest." Just from a practical standpoint—and I have not engaged in much longshore defense work for the stevedoring industry, although I am engaged in some—it would seem that there has got to be an area, at least within the swing of a crane boom, that would allow that point of rest to be somewhat landward of the end of a pier. So the Nacirema fellow, in my view, would be covered under the Longshoremen's Act, under the present bill.

Mr. **Niles**. But, Mr. Chairman, we note we are not experts in the field of jurisdiction for longshoremen; we would also note that the election of remedies issue should solve the problem without any difficulty at all.

Senator **Williams**. That is not in the bill; you are suggesting that that be added to the bill, is that right?

Mr. **Niles**. Yes, sir, that is correct. There is some question at this time whether existing jurisprudence would or would not support the election of remedies doctrine, if the bill is amended in its current fashion.

Senator **Williams**. You know, there is one thing—just to change to another area very briefly, Mr. Chairman—there is one thing that greatly offends me, that there seems to be so much concern on the part of the company side that so strongly insists that the injured worker turn his body over for repair to the company's doctor. That is just profoundly offensive to me.

Mr. **Niles**. Yes,. sir. I think someone has taken that issue and perhaps couched it in wrongful terms. As I appreciate the inner workings of the act, what happens is that the deputy commissioner is going to control this, the Department of Labor is going to control this. The Department of Labor will develop the panel. It is the employer's responsibility to submit the panel doctors to the employee to make sure he is cognizant of those doctors, but the deputy commissioner's office appoints the physicians. Indeed, upon the recommendation of the employer, but he can go beyond that recommendation and decide that the deputy commissioner will control—he is given much greater powers to control the medical aspects of the case, so we avoid doctor shopping. If the employee wants to go to another doctor, he does not go to the employer; he goes to the deputy commissioner under this bill. The deputy commissioner would sit down with the employee and work out in his best interest the selection of another doctor. But we would not have doctor shopping, which is the avoidance of an abuse which is well established in many areas of the country.

Senator WILLIAMS. Well, here, it is the company's money, but it is the injured worker's body. Where do the workers get into the selection of that panel of doctors, in your proposal?

Mr. NILES. In the bill as is currently proposed, the injured worker gets involved in making his selection from the panel, and he only deals with the Department of Labor.

Senator WILLIAMS. From the panel——

Mr. NILES. And he only deals with the Department of Labor. The employer has no dealings with the employee in that regard whatsoever.

Senator WILLIAMS. All right.

Mr. NILES. The employer cannot dictate, he cannot suggest, he cannot coerce. The Department of Labor acts as an intermediary to ensure that there is an evenhanded balance.

Senator WILLIAMS. So it is the bureaucracy that creates the panel, the governmental bureaucracy—even worse——

Mr. NILES. Senator Williams, I agree. There are 30 or 40 other provisions which corroborate the bureaucratic morass, and those need to be removed also.

But in this particular aspect, we noted—and we have noted in hearings since 1977—that the panel process administered by the Department of Labor at the local level—not up here in Washington, but back in the trenches on the local level—it worked. And it worked before 1972.

Senator WILLIAMS. Would you turn your selection of doctor over to a Federal Government bureaucrat?

Mr. NILES. No, sir.

Senator WILLIAMS. Neither would I.

Mr. NILES. But there is a misconception there. The Federal bureaucrat does not select the doctor. The Federal Government selects a panel, a list. If you are in, let us say, the city of XYZ, and there are 14 doctors there——

Senator WILLIAMS. But who picks the panel, Mr. Niles? Who picks the panel?

Mr. NILES. The suggestion comes from the employer. Do you know what we have now, Mr. Williams? We have a problem because you get chiropractors who come in and want to handle problems which are beyond their expertise—that is not to say that they do not have areas that they can handle.

Senator WILLIAMS. I am glad you said that.

Mr. NILES. Yes, sir. But let us say you have a complicated stomach ulcer case. I do not know whether or not a chiropractor does or does not have the expertise to handle a bleeding, acute, duodenal ulcer; he may or may not. But I suggest to you, where a panel has been set up that is monitored by the Department of Labor, both sides have an opportunity to complain about that panel in advance of the accident so administrative relief can be sought, and you know that for pulmonary problems, there are these 4 doctors you can go to, and for orthopedic problems, there are these 20 doctors you can go do, and for neurologists and neurosurgeons, there are these 87 doctors you can go to—it is all there, black and white, established upfront, the rules are clear. Get rid of doctor shopping, and you get rid of the gamesmanship in the litigation process, and you have doctors who are certified in their fields of expertise, for the particular types of problems that the employee is presenting, so he is getting the best, most competent, certified medical care for his particular medical problem.

Mr. **McElveen**. Let me, if I may, Senator Williams, just reply very briefly in addition to that. From the point of view of a trial practitioner, I see a lot of these cases, and the fact is that in a number of cases, you see not individuals who are going to doctors in the local community, but people who are traveling 45 and 60 miles away, or in some cases, several hundred miles away, to see physicians who practice the same specialties that are practiced by physicians in the local community.

For a while, the regulations of the Labor Department provided that the selection of physicians should be within a 25-mile radius of the employee's home. That was not a bad idea. There might be some specialties for particular disease processes in which you might not be able to find a qualified cadre of specialists practicing within 25 miles, but certainly, to go 45 or 60 miles away to see an orthopedic surgeon, whose name we have seen again and again in these cases, and whose bottom line you can tell by reading the name on his letterhead, is certainly, I think, prone to breeding abuse.

Senator **Williams**. Thank you.

Senator **Nickles**. Gentlemen, we appreciate your cooperation, and we would like to keep it open where we can ask you additional questions for the record.

Thank you very much.

Our fifth and final panel today includes William Potter, president and treasurer of Fairhaven Marine, in Massachusetts, on behalf of the American Boat Builders & Repairers Association; John Buursema, president of Twin City Shipyard, St. Paul, Minn., on behalf of American Waterways Shipyard Conference, and Robert J. Massman, secretary of Massman Construction Co., St. Louis, Mo.

Welcome gentlemen. Please proceed, Mr. Potter.

STATEMENT OF WILLIAM H. POTTER, PRESIDENT AND TREASURER OF FAIRHAVEN MARINE, INC., MASSACHUSETTS, REPRESENTING AMERICAN BOAT BUILDERS & REPAIRERS ASSOCIATION, INC.; JOHN BUURSEMA, PRESIDENT OF TWIN CITY SHIPYARD, ST. PAUL, MINN., REPRESENTING AMERICAN WATERWAYS SHIPYARD CONFERENCE; AND ROBERT J. MASSMAN, SECRETARY OF MASSMAN CONSTRUCTION CO., ST. LOUIS, MO., A PANEL

Mr. **Potter**. Thank you, Mr. Chairman.

I represent the American Boat Builders & Repairers Association, and also my own company, which is Fairhaven Marine, in Fairhaven, Mass.

American Boat Builders is a national organization of over 160 small shipyards, boatyards, boat manufacturers, and marinas, employing approximately 2,000 persons. Geographically, our membership covers primarily the east coast of the United States, but we do have some members in the South and Midwest.

Up until 1972 changes in the implementation of the Longshoremen's and Harbor Workers' Act, none of the members of the American Boat Builders had any difficulty in operating under the provisions of the act.

However, the issuance of the so-called rule 21 and its interpretation by the Department of Labor created chaos in the industry. Prior to rule 21, only the employees of member yards to come under the act were those who were injured while working over navigable waters on a vessel, dock, or marine railway. This is at least as far as we are concerned in Massachusetts.

Rule 21 extended the coverage to employees who meet the status and situs test. I will not go into that, because I am sure that has been beaten to death. In actual practice, the Department of Labor in its implementation of rule 21, has ruled that anyone employed in a maritime industry located on navigable waters and performing maritime activities is covered under the Longshoremen's and Harbor Workers' Act. The results of this ruling have been disastrous. Some of the reasons are as follows. Weekly benefits have skyrocketed. Employer costs have become unbearable and unrealistic. Employees are encouraged to abuse the program, remain out of work for excessive periods of time, retain legal assistance to maximize benefits. As a result, consumer costs increase.

Several of the American Boat Builders and Repairers Association members have had difficulty in securing compensation, and if and when obtained, the rates are exorbitant.

Prior to the 1972 amendments, Fairhaven Marine's annual workmen's compensation costs were approximately $21,000. In 1978, these costs increased to over $100,000, with no relief in 1979 or 1980. Currently, we estimate that our workmen's compensation costs are the equivalent of over $1.50 per working man-hour.

The association has been involved in efforts to secure relief from the Longshoremen's and Harbor Workers' Act continuously since 1977. Association testimony may be found in the booklet entitled, "Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act," part 1, pages 920 to 934.

On behalf of the members of the association, it is respectfully requested that the present critical situation be remedied by forthwith passage of S. 1182 and its companion bill, H.R. 25.

I have a couple of remarks that I would like to make that are not included in my presentation.

We face certain problems. As an illustration, we had two rather severe cases on which the insurance company set up a reserve of over $100,000. We are a small shipyard whose total volume runs $2 million to $2.5 million. So I think you can appreciate that that is a significant amount. However, on one of the cases, we had no question it was legitimate. The other was a case where a man worked for us 1 day, fell backward into the water, and he has a reserve set up for $45,000. Now, we know that he is the type of person who actually fakes that sort of thing. We know that we have had cases where people have "dogged it", and have not returned to work because actually, their net income was much more under insurance comp benefits than their net pay in the yard.

In 1980, we found ourselves in a very, very serious financial situation. Some of it was our own fault, because we went onto retrospective insurance in 1976, I guess it was, and because of the two accidents that I listed above, we got an assessment of $67,000, boom, like that. That was in addition to our normal compensation insurance.

Another point I would like to make is that we have shipyards and marine activity along the waterfront in Fairhaven. One of them makes winches. And my understanding is that they are under the State act, where actually, they are adjacent to navigable waters, and they are to some extent, maritime employees.

The final point that I would like to make is that every day, we see advertisements in our local papers where lawyers are soliciting the employees to come to them so that they can get the maximum amount for their employees, and these lawyers work on a contingency basis. Experience at home is that if a laywer takes a case, normally, he will get somewhere from 25 to 30 percent of whatever the award would be, based on a contingency basis.

Thank you, sir.

Senator **NICKLES**. Thank you, Mr. Potter.

Mr. Buursema.

Mr. **BUURSEMA**. Mr. Chairman, thank you for the opportunity to present our views on the Longshoremen's and Harbor Workers' Compensation Act.

My name is John Buursema. I am President of Twin City Shipyard, Inc., located in St. Paul, Minn., and I am also the chairman of the American Waterways Shipyard Conference, on whose behalf I am here today.

Mr. Chairman, we support with enthusiasm S. 1182, and are pleased to join with others in the industry who urge that this legislation be enacted. My presentation, however, will be confined essentially to the most aggravating aspect of the existing law to small- and medium-sized shipyards' jurisdiction over land-based workers.

The Shipyard Conference was founded in 1976 as a direct result of the 1972 amendments to the Longshore Act. It has grown into an organization of over 70 small and medium-sized commercial shipyards located on the east, west, and gulf coasts, the Great Lakes, and the inland rivers.

The economic contributions to the Nation by this industry far exceed its size. These shipyards build and repair the tugboats, towboats, and barges for the fuel-efficient water transportation industry which carries 12 percent of the Nation's freight; the crewboats, supply boats and other specialized vessels servicing the offshore oil and mining industries and vessels for the commercial fishing industry.

Land-based shipyard workers were, prior to 1972, traditionally compensated for their job-related injuries and disabilities by their

State workers' compensation. After the Longshoremen's and Harbor Workers' Compensation Act was amended in 1972, these workers employed by small- and medium-sized shipyards were inadvertently swept under the coverage of the Federal act, while remaining subject to coverage under State laws.

The 1972 amendments have been disastrous for small- and medium-sized shipyards. Prior to 1972, approximately 10 percent of the work force was covered by the act; after the 1972 amendments, 90 percent was covered. From 1972 until the end of 1979, wages doubled whereas compensation costs increased over 8 times. Since 1972, approximately 100 shipyards left the industry either through bankruptcy or by a decision to abandon the shipbuilding industry entirely in favor of other nonmaritime steel fabrication industries where the casino-like risks of the Longshore Act were not involved.

Prior to 1972, many shipyards turned to nonmaritime work when the shipbuilding cycle turned down in order to maintain their highly-skilled work force. They were able to do outside machine shop work and steel fabrication for bridges, highways, buildings, and other types of construction. This is now impossible because the shipyards are no longer competitive with other steel fabricators who do not have to carry Longshore Act insurance.

Because of the high costs associated with the Longshore Act, many of our shipyards are unable to compete with foreign yards, especially those that build for the offshore service industry, despite the fact that they have led the world in this technology.

Employers and employees have been unable to determine which shipyard workers are covered under the act. Since it has become virtually impossible to predict the degree of risk exposure, the number of insurance companies willing to write this coverage has dropped from over 100 to a handful.

Those still willing to write such coverage are extremely selective, and their deductibles are often in six figures.

Shipyards that cannot purchase insurance from a private company are forced to turn to their States' assigned risk pools, if that is available. Another alternative is self insurance, but that is not a feasible possibility for most medium-sized companies, and certainly not for small companies.

It is regrettable that the small- and medium-sized shipyards did not participate in the 1972 hearings, but it is even more regrettable that neither the specific formula for increasing the benefits nor the provisions for extending the Longshore Act coverage and jurisdiction throughout the shipyards appeared in the bills then under consideration.

The evolution of the 1972 amendments reveals that extended coverage for shipyards was a product of a staff conference between House and Senate committees. Shipyards were not a part of the conferences. These conferences, commonly referred to as the "midnight meeting", concerned stevedores, shipowners, and longshoremen. In a negotiated agreement among those parties, jurisdiction for shipyards and other nonlongshoring interests was extended landward, inadvertently sweeping them under the Longshore Act coverage.

The shipbuilding industry has exhausted its administrative remedies with the Department of Labor; it has fought many court battles with several reaching the U.S. Supreme Court, and it has testified four times at House and Senate subcommittee oversight hearings.

The American Waterways Shipyard Conference has always stood for the proposition that a jurisdictional amendment returning coverage back to the water's edge would be the most straightforward approach to obtaining equitable relief for our industry. On September 30, 1980, a corrective amendment was attached to H.R. 6671, and was passed by the Senate without objection. In effect, this amendment would have removed from coverage the land-based commercial boat builders and repairers who work on barges, tugboats, towboats, supply boats, fishing boats, and so forth. Incidentally, this amendment would have also excluded recreational boat manufacturers who, according to the Department of Labor's interpretation are covered by the act, but who are often located great distances from navigable waters.

This amendment was offered to H.R. 6671 by Senators Exon of Nebraska and Danforth of Missouri. The amendment failed late in the 96th Congress when one Congressman adamantly insisted that it be deleted from H.R. 6671, which was a bill to unify the rules of the road. The Senate proponents of the amendment finally acquiesced in order to save the provisions of the underlying legislation. We believe therefore, that there is broad congressional sentiment for relief from the provisions of the Longshore Act for our industry. We were heartened by this action. Not since 1972 has legislation seeking to amend the act gone as far. We are also heartened, Mr. Chairman, that this committee appears to us to be more receptive to change in this law than any of the several other committees we have implored for help.

The American Waterways Shipyard Conference is an active member of the Longshore Action Committee, and we do strongly support H.R. 25 and S. 1182, bills to amend the Longshoremen's and Harbor Workers' Compensation Act.

Although we have, in the interest of time, confined our discussion to the jurisdictional sweep of the existing law as it adversely affects our industry, we support statements made by other witnesses at these hearings who have spoken, and who will speak to the need for other remedial provisions of the legislation before you.

Our industry is in a crisis because of the Longshore Act, and we hope that the members of this committee will take early action to advance this legislation. We appeal to you to take action that will once again give our shipyards an opportunity to compete on a fair and even basis, as we were able to do prior to 1972.

Thank you, on behalf of the American Waterways Shipyard Conference.

[The following was received for the record:]

COMPANIES OUT OF THE SHIPBUILDING/SHIP REPAIR BUSINESS 1970 - 1980

(In 1975 the American Waterways Shipyard Conference (AWSC) made its first survey of the industry. The following companies either were no longer in the marine business or the mail was returned indicating that the company was no longer in business. The year is identified at the side of the company's name.)

ALABAMA

Peterson Manufacturing Company, Mobile (75)

ALASKA

Northern Machine and Marine, Inc., Ketchikan (75)

ARKANSAS

Johnson Shipyard, Helena (77)
Turner Equipment Rental, Pine Bluff (75)

CALIFORNIA

Berkeley Steel Construction Co., Inc., Berkeley (75)
Fellow and Standard, Terminal Island (76)
Gillete Marine Ways, Inc., Samoa (76)
Harbor Boat Building Co., Terminal Island (76)
Los Angeles Harbor Marine Co., San Pedro (75)
McDonough Steel Company, Oakland (75)
Pacific Ship Repair, Inc. (75)
Sausalito Marine, Sausalito (76)
Seimer Ship Repair Co., San Francisco (75)
Willamette Iron and Steel Co., Richmond (78)
Wilmington Welding and Boiler Works, Wilmington (80)

DELEWARE

Wilson Shipyard, Inc., Wilmington (75)

FLORIDA

Barcone Marine Corporation, Fort Lauderdale (75)
Key West Marine Railroad, Key West (79)
Southport Shipyard, Southport (75)

GEORGIA

Augusta Iron and Steel Works, Inc. Augusta (75)

ILLINOIS

Chicago Bridge and Iron Co., Oak Brook (75)
F & B Marine Service Inc., Morris (77)

INDIANA

Marine Builders, Inc., Clarksville (77)
Ryan Contracting Co., Evansville (75)
Yates Marine Construction Co., Jeffersonville (75)

IOWA

Dubuque Boat and Boiler Co., Dubuque (75)

LOUISIANA

Acme Contracters, New Orleans (75)
Alumaship Corporation, Jeanerette (76)
American Gulf Shipbuilding, Larose (79)
Canal Marine Repairs, New Orleans (76)
Cajun Boat Building, Jeanerette (80)
CJ & S Marine Sales, Avondale (79)
Dependa Craft, Pierepart (76)
Gerretts, J.A., Inc., New Orleans (76)
Gulf Overseas Service Corporation, New Iberia (75)
Horn's Red River Shipyard, Shreveport (75)
Inland Offshore Fabricators, New Iberia (80)
Leeville Shipyard Corporation, Golden Meadow (80)
Marine Industries Co., Morgan City (76)
Serrits, J.S., New Orleans (76)
Sewart Seacraft, Berwick (75)
Slidell Marine Fabricators, Inc., Slidell (75)
T & D Shipyard, Inc., Cut Off (79)
Taylor Shipyard, Maurice (75)
Tetraco, Inc., (76)
Walkland Marine Works, Inc. Baldwin (79)

MAINE

Dammarriscotta Boatyard, Dammarriscotta (76)

MARYLAND

Baltimore Marine Repair Shops, Baltimore (79)
Booz Brothers, Inc., Baltimore (79)
Crisfield Shipyard, Crisfield (76)
Arundel Corporation, Baltimore (75)
N.E. Insley, Inc., Crisfield (75)

MASSACHUSETTS

Hodge Boiler Works, East Boston (75)
Murach Marine Service, Inc., Acushnet (77)
Tringale & Sons, Inc., East Boston (75)

MICHIGAN

Defoe Shipbuilding Co., Bay City (76)
Harrington Construction Co., Fennville (75)

MISSISSIPPI

Big River Shipbuilding, Inc., Vicksburg (75)
DACO, Biloxi (76)
Gulf Boat Building Corporation, Biloxi (75)
Industrial Steel and Machine Works, Gulfport (75)
Jackson Company Shipyard, Moss Point (80)
Jackson Landing Shipyard, Inc., Pearlington (76)
Tocheboat Builders, Ocean Springs (77)
Walker & Sons, Inc., Pascagoula (77)

MISSOURI

Standard Boat and Motor Co., St. Louis (75)

NEW JERSEY

Brighton Marine Repair Yard, Hoboken (76)
O'Kane Marine Repair Co., Hoboken (75)

NEW YORK

Braswell Shipyard, Brooklyn (76)
Tollefsen Bros., Contracting, Brooklyn (76)
Voyage Repair Corporation, New York (75)

NORTH CAROLINA

Carolina Marine & Dry Dock, Wilmington (77)
Elizabeth City Iron Works & Supply Co., Elizabeth City (75)
New Bern Shipyards, Inc., New Bern (75)
N.C. Shipbuilding & Dry Dock, Wilmington (80)

OHIO

Carlson Steel and Fabricating Co., Astabula (75)
Frisbie Engine And Machine Co., Cincinnati (75)
Portsmouth Docking Co., Portsmouth (80)
William Ferrel, Inc., Toledo (75)

OREGON

Bumble Bee Seafoods, Asotria (80)
Coos Bay Steel Fabricating Co., Coos Bay (75)
Portland Industrial Plastics, Portland (79)

PENNSLYVANIA

Delaware Ship Repair & Dry Dock, Philadelphia (75)
Erie Marine, Inc., Erie (75)
J.W. Nolan Boat Works, Erie (80)

RHODE ISLAND

P & M, Newport (78)

SOUTH CARLOLINA

Charleston Dry Dock And Shipbuilding Co., Charleston (75)

TENNESSEE

Rice Marine Railway Co., Readyville (77)

TEXAS

Andy International, Inc. Houston (75)
Bishop Shipbuilding Corporation, Arnasas Pass (75)
Freeport Marine Ways, Freeport (75)
H. C. Hartzog Shipyard, Port Lavaca (75)
Hartzog Shipyard, Port Lavaca (80)
Howard Iron & Supply Co., Inc., Brownsville (75)
Neches Intersection Shipyard Co., Inc., Port Arthur (75)
Nueces Shipyard, Inc., Corpus Christi (75)
Port Houston Iron, Houston (76)
South Texas Shipyard, Inc., Corpus Christi (79)
Texas Maritime Industries, Corpus Christi (75)
United Shipbuilding & Repair, Port Arthur (75)

VIRGINIA

Allen Industries, Great Bridge (76)
Craig Brothers Marine Railway, Norfolk (78)
Phoenix Marine, Norfolk (78)

WASHINGTON

Arcweld Manufacturing Co., Inc., Seattle (75)
Fairhaven Shipyard, Bellingham (76)
Isaacson Structural Steel Co., Seattle (75)
Maritime Shipyards & Petrich Machine Works, Seattle (75)
Martinolich Shipyard, Tacoma (76)
Raider Marine Corporation, Anacortes (80)
Reliable Steel Fabricators, Olympia (75)
Tripple & Everett Marine Ways, Inc., Seattle (75)
Western Marine, Tacoma (76)

NORTHEAST

Allied Marine, Northeast
Ryder Yachts, Northeast

Updated 6/8/81

AMERICAN WATERWAYS SHIPYARD CONFERENCE

ACADIAN SHIPYARD, INC.
P. O. Box 298, Highway 24
Bourg, LA 70343
(504) 594-4123
Rep: J. Fletcher Wallace
Alt: James W. Pate

ALGIERS IRON WORKS
& DRY DOCK CO., INC.
P. O. Box 6068
New Orleans, LA 70174
(504) 362-7960
Rep: Childs E. Dunbar, Jr.
Alt: Sewell Williams

U. S. S. FABRICATIONS
Park Road
Ambridge, PA 15003
(412)266-2270
Rep: Ralph A. Frederick, Jr.
Alt: Robert E. Bestwick

ATLANTIC MARINE INC.
P. O. Box 138
Fort George Island, FL 32226
(904) 251-3111
Rep: D. C. Sellers, Jr.

AVONDALE SHIPYARDS, INC.
P. O. Box 50280
New Orleans, LA 70150
(504)436-2121
Rep: J. M. Garrett
(504)341-4211, x271
Alt: Albert L. Bossier, Jr.
Alt: Clarence Geier

AZALEA FLEET, INC.
P. O. Box 537
Ama, LA 70031
(504) 431-7368
Rep: Curtis L. Anderson
Alt: Greg Derbes
Alt: Steve Port

BLUDWORTH BOND SHIPYARD, INC.
8114 Hockley
Houston, TX 77012
(713)923-2001
Rep: Harold M. Bludworth
Alt: Leonard M. Bond

JOHN BLUDWORTH MARINE, INC.
P. O. Box 6504
Pasadena, TX 77506
(713)473-5561
Rep: John Bludworth
Alt: C. Ray Etheridge

IRA S. BUSHEY & SONS, INC.
764 Court Street
Brooklyn, NY 11231
(212) 237-6950
Rep: Ira B. Bushey
Alt: Francis B. Bushey

C & C MARINE MAINTENANCE CO.
P. O. Box 118
Georgetown, PA 15043
(412)573-9863
Rep: Clifford H. Crain
Alt: R. E. Scatterday

CARGO CARRIERS, INC.
P. O. Box 9067
Pine Bluff, AR 71601
(501) 535-8372
Rep: Robert N. Krause
Alt: Robert Hertzberg
(P. O. Box 9300,
Minneapolis, MN 55440)

CHANNEL SHIPYARD CO., INC.
P. O. Box 926
Highlands, TX 77562
(713)424-5581
Rep: Donald Neisig
Alt: Dennis Steger

COLONNA'S SHIPYARD, INC.
400 E. Indian River Road
Norfolk, VA 23523
(804)545-2414
Rep: Phillip Moberg
Alt: Charles R. Poyner

CRUMPLER'S SHIPBUILDING CO., INC.
P. O. Drawer 848
Bridge City, TX 77611
(713) 735-5356
Rep: J. O. Crumpler
Alt: D. C. Crumpler

DELTA SHIPYARD
(Chromalloy American Corp.)
P. O. Box 101
Houma, LA 70361
(504)868-7450
Rep: R. A. Arceneaux
Alt: Christian Olivier

DRAVO CORPORATION
4800 Grand Avenue, Neville Island
Pittsburgh, PA 15225
(412)771-1200
Rep: L. E. Greene
Alt: N. B. Mortimer
Alt: C. A. Patten
Alt: E. D. McMurry
Alt: Donald Courtsal
Alt: R. F. Smail,
(One Oliver Plaza,
Pittsburgh, PA 15222)

DRAVO STEELSHIP CORP.
Route 4, Box 76
Pine Bluff, AR 71602
(501) 536-0362
Rep: George ~~Steuel~~ Stevel
V.P./General Manager

DUWAMISH SHIPYARD, INC.
5658 Marginal Way, S. W.
Seattle, WA 98106
(206)767-4880
Rep: Daniel J. Larsen
Alt: David M. Larsen
Alt: Oswald E. Meberg

EQUITABLE SHIPYARDS, INC.
P. O. Box 8001
New Orleans, LA 70182
(504)835-0398
Rep: Jim Blenkhorn
Alt: J. Frank Williams
V.P. - Sales
Alt: Kisan Pandit
Chief Engineer/Naval Architect

FORKED ISLAND SHIPYARD, INC.
P. O. Box 219
Kaplan, LA 70548
(318) 642-5646
Rep: E. A. Ray, Jr.

GALVESTON SHIPBUILDING COMPANY
P. O. Box 2660
Galveston, TX 77553
(713)744-0491
Rep: Nat McClure
Alt: Dan Jones

GEOSOURCE INC.
Marine Services Division
P. O. Box 24
Harvey, LA 70059
(504) 368-7600
Rep: D. M. Gordon
Alt: Vincent Moore, Jr.

GOLDSTON SHIPBUILDING CORP.
P. O. Box 9914
Corpus Christi, TX 78408
(512) 776-6596
Rep: Jack O. Pirozzolo
(512) 643-4586
Alt: William Goldston
(512) 883-9381

GRETNA MACHINE
& IRON WORKS, INC.
P. O. Box 215
Harvey, LA 70058
(504)367-8080
Rep: George J. Fegert
Alt: D. Kenneth Boothe
Alt: Martin de Matteo

GULF-TAMPA DRYDOCK CO.
1200 Sertoma Drive
Tampa, FL 33605
(813) 247-3153
Rep: George H. Lorton
Alt: Gilbert E. Turner

HARRISON BROTHERS DRY DOCK
& REPAIR YARD, INC.
P. O. Box 1843
Mobile, AL 36601
(205)432-4607
Rep: W. H. Harrison, Jr.
Alt: W. T. Ames

HELENA MARINE SERVICE, INC.
P. O. Box 428
Helena, AR 72342
(501)338-8311
Rep: Jim Walden
Alt: C. Blake Robertson

HBC BARGE, INC.
P. O. Box 510
Brownsville, PA 15417
(412)785-6100
Rep: Robert E. Kenny, Pres.

HUDSON SHIPBUILDERS, INC.
3911 Cedar fStreet
Pascagoula, MS 39567
(601) 762-4626
Rep: Travis E. Short
Alt: F. W. Ventura

INGALLS MARINE
Marine Division
P. O. Box 368
Decatur, AL 35602
(205)353-1962
Rep: R. S. Byers
Alt: George W. Hall
(P.O. Box 2527,
Birmingham, AL 35202)

INTRACOASTAL CITY DRYDOCK
& SHIPBUILDING, INC.
Route 3, Box 2454
Abbeville, LA 70510
(318) 893-4184
Rep: Lewis J. Faciane
Alt: William E. Faciane

JANOUSH MARINE, INC.
Port of Rosedale
P. O. Box 640
Rosedale, MS 38769
(601) 759-3526
Rep: Joe W. Janoush
Alt: Paul Janoush

JEFFBOAT, INCORPORATED
1030 East Market Street
P. O. Box 610
Jeffersonville, IN 47130
(812)288-0100
Rep: Robert W. Greene, III
Alt: Wayne La Grange

LEMONT SHIPBUILDING & REPAIR CO.
P. O. Box 370
Lemont, IL 60439
(312)739-5000
Rep: Anton Drabik

MCDERMOTT SHIPYARDS
P. O. Box 588
Amelia, LA 70340
(504)631-2561
Rep: F. W. Finger
(P.O. Box 60035,
New Orleans, LA 70160)
Alt: V. J. LeBlanc
Alt: F. San Miguel

M/G TRANSPORT SERVICES, INC.
111 East Fourth Street
Cincinnati, OH 45202
(513)721-3795
Rep: David T. Sheehy
Alt: Richard A. Hain

MAIN IRON WORKS, INC.
P. O. Box 1106
Houma, LA 70361
(504)876-6302
Rep: Lawrence Mazerac, Jr.
Alt: Le Roy J. Molaison

MAINSTREAM SHIPYARDS
& SUPPLY, INC.
P. O. Box 1559
Greenville, MS 38701
(601)335-8700
Rep: J. L. Williams
Alt: Stanley Walters

MANGONE SWIFTSHIPS, INC.
819 South 80th Street
P. O. Box 5446
Houston, TX 77012
(713)926-9451
Rep: Don L. Godeau
Alt: John W. Jordan

MARATHON SHIPBUILDING COMPANY
P. O. Box 870
Vicksburg, MS 39180
(601)636-9161
Rep: Charles Franck
(LeTourneau Rural Station
Vicksburg, MS 39180)
Alt: Jackie A. Tohill

MARINETTE MARINE CORPORATION
Foot of Ely Street
Marinette, WI 54143
(715) 735-9341
Rep: Charles L. Nord
Alt: Roger Derusha

MISENER INDUSTRIES, INC.
5302 W. Tyson Avenue
P. O. Box 13625
Tampa, FL 33682
(813) 837-8522
Rep: R. E. Goerlich, Jr.
Alt: Paul W. Booher

MISSISSIPPI MARINE CORPORATION
P. O. Box 539
Greenville, MS 38701
(601)332-5457
Rep: D. John Nichols
Alt: K. D. Griffin

MISSOURI DRY DOCK
& REPAIR CO., INC.
P. O. Box 700
Cape Girardeau, MO 63701
(314)335-6685
Rep: R. W. Erlbacher II
Alt: Curtis Moore

MOLLOY MARINE SERVICE, INC.
P. O. Box 1091
Paducah, KY 42001
(502) 443-6456 or 57
Rep: Lee Molloy
Alt: Richard L. Noel

NASHVILLE BRIDGE COMPANY
P. O. Box 239
Nashville, TN 37202
(615)244-2050
Rep: Richard Buntele

NATIONAL MARINE SERVICE INC.
Shipyard Division
P. O. Box 38
Hartford, IL 62048
(618)254-7451
Rep: E. E. Ahlemeyer
Alt: R. E. Carroll, Sr.
(Foot of Hawthorne)

NATIONAL MARINE SERVICE -
LOUISIANA DIVISION
P. O. Box 1138
Harvey, LA 70059
Rep: Glen Fornell
Alt: Earl Jeansone

NEW ORLEANS SHIPYARD, INC.
10825 Watson Road
St. Louis, MO 63127
(504)431-9300
Rep: Joseph W. Rose
Alt: Hugh Hammond
(Box 446, Westwego, LA 70

NEWPARK SHIPBUILDING
& REPAIR, INC.
P. O. Box 5426
Houston, TX 77012
(713)928-5051
Rep: John W. Sansing
Alt: James H. Sessions

ORANGE SHIPBUILDING CO., INC.
P. O. Box 1670
Orange, TX 77630
(713)883-6666
Rep: Robert M. Clary

PACIFIC DRYDOCK & REPAIR CO.
1441 Embarcadero
Oakland, CA 94606
(415) 839-4020
Rep: R. G. Hartsock

PLATZER SHIPYARD, INC.
P. O. Box 24399
Houston, TX 77015
(713)453-7251
Rep: Neal S. Platzer
Alt: Harry L. Sloat
Alt: E. Wiltsie Platzer

PORT ALLEN MARINE SERVICE, INC.
P. O. Box 108
Port Allen, LA 70767
(504) 749-3187
Rep: Walter W. Rody
Alt: William H. Swiggart
Alt: Gerald J. Smith

PUERTO RICO DRYDOCK
& MARINE TERMINALS, INC.
P. O. Box 2209
San Juan, PR 00903
723-0769
Rep: Capt. F. B. Crocco
Alt: G. Garcia Chamon
(723-6010, x 232)

RESERVE BARGE SERVICE, INC.
800 Whitney Building
New Orleans, LA 70130
(504) 522-9675
Rep: Ingersoll Jordan
Alt: Robert L. Kuhner

RIVERWAY SHIPYARD COMPANY
P. O. Box 308
Foot of Oak Street
Grafton, IL 62037
(618) 786-3371
Rep: Alan F. Hauff
Alt: Michael Howard

RODERMOND INDUSTRIES, INC.
184 Henderson Street
Jersey City, NJ 07302
(201)332-3300
Rep: Michael J. Gallagher
Alt: James F. Murphy

RYSCO SHIPYARD, INC.
P. O. Box 578
Blountstown, FL 32424
(904)674-5475
Rep: Mrs. Sylvia H. Gates
Alt: Michael A. McMillan

RYSCO SHIPYARD, INC.
P. O. Box 662
Rockport, TX 78382
(512) 729-5431
Rep: Sylvia H. Gates
Alt: Jack O Pirozzolo
Alt: Robert Konvicka
Alt: Michael A. McMillan
Alt: James Dupnik
Alt: T. M. Smith, III

ST. LOUIS SHIP
(Pott Industries, Inc.)
611 East Marceau Street
St. Louis, MO 63111
(314)638-4000
Rep: Edward Renshaw
Alt: Anthony G. Tobin

ST. LOUIS SHIP
(Pott Industries, Inc.)
Canal Place One, Suite 2400
New Orleans, LA 70130
(504)581-2069
Rep: W. R. Cumming
Alt: A. G. Tobin (at St. Louis address)

SAUCER MARINE SERVICE, INC.
P. O. Box 3067 (Bywater Station)
New Orleans, LA 70117
(504)944-3316
Rep: K. D. Saucer
Alt: L. A. Calvin

THE SERVICE MACHINE GROUP
P. O. Box 2664
Morgan City, LA 70380
(504)631-0511
Rep: Daniel J. Duplantis
Alt: B. C. Fernandez

SOUTHERN SHIPBUILDING CORP.
P. O. Box 1089
Slidell, LA 70458
(504)643-3144
Rep: Z. J. Hymel, Jr.
Alt: Alain Seligman

SOUTHWESTERN BARGE
FLEET SERVICE
P. O. Box 845
Highlands, TX 77562
(713)452-5857
Rep: H. T. Hilliard
Alt: H. T. Hilliard, Jr.

STEINER SHIPYARD, INC.
20 Woodruff Avenue
Bayou La Batre, AL 36509
(205) 824-4143
Rep: Russell R. Steiner
Alt: Vincent Bosarge

SUPERIOR BOAT WORKS, INC.
P. O. Drawer 8
Greenville, MS 38701
(601)378-9100
Rep: Lea Brent
Alt: Bruce Feigley
 (P. O. Box 326
 Greenville, MS 38701)
Alt: Monroe Barrett

TEXAS SHIPBUILDING COMPANY
P. O. Box 24787
Penn City Road
Houston, TX 77013
(713) 453-8341
Rep: Otho H. Haunschild
Alt: J. M. Kyle, Jr.

THRIFT SHIPBUILDING & REPAIR
P. O. Box 14
Sulphur, LA 70663
(318) 583-2396
Rep: W. E. Thrift, Sr.
Alt: W. E. Thrift, Jr.

TODD SHIPYARDS CORPORATION
P. O. Box 9666
Houston, TX 77015
(713)453-7261
Rep: Vincent H. Horbelt
Alt: Paul J. O'Keefe
 (Foot of Dwight Street,
 Brooklyn, NY 11231
Alt: A. W. Stout
Alt: John Meghrian

TWIN CITY SHIPYARD, INC.
P. O. Box 43032
St. Paul, MN 55164
(612) 738-8300
Rep: John Buursema
Alt: John W. Lambert

UNION DRY DOCK
 & REPAIR COMPANY
Foot of Pershing Road
Weehawken, NJ 07087
(201)867-0904
Rep: Robert J. Burke
Alt: Robert F. Bond

WALKER BOAT YARD, INC.
P. O. Box 729
Paducah, KY 42001
(502)442-2738
Rep: Paul Walker
Alt: Robert Penny

ZIGLER SHIPYARDS
(Div. of Lee-Vac Ltd.)
P. O. Box 1190
Jennings, LA 70546
(318)824-2210
Rep: Dennis J. Banta
Alt: Herb Picou

Senator NICKLES. Thank you, Mr. Buursema.

Mr. Massman, welcome again. It is nice to see you again.

Mr. MASSMAN. Thank you, Mr. Chairman. I would like to say in the beginning, while I am in front of your committee again, this is the first time that we have appeared as far as longshoring and harbor workers' coverage is concerned.

My name is Robert Massman, and I am a construction contractor from Kansas City, Mo. I am here today representing the Associated General Contractors of America, a trade association representing 8,400 general contractors.

We thank you for the opportunity to present our statement to you.

General contractors, particularly those involved in the construction of facilities on or over navigable water, have been aware of the U.S. Longshoremen's and Harbor Workers' Act for some time. It was not until recently, however, that the Longshoremen's Act became an ever-increasing problem not only for construction contractors who work on or over navigable water, but also for contractors who work near water.

Claims for Longshoremen's Act benefits by employees of contractors who operate on, over, or near water have increased greatly since the 1972 amendments, as has the scope of exposure as to what sites are, or what sites could be, construed to be included under the act. In most situations, the contractor is unaware that he is faced with a Longshoremen's Act exposure; nor, we believe, should a construction contractor have any reason to expect that his operations are subject to the Longshoremen's Act.

The definition of maritime employment, as it appears in the Longshoremen's Act, was never intended to cover construction operations. Construction is certainly not, nor should it be construed as, maritime employment. Employees injured in the course of their employment while working for a construction contractor perform the same duties inland as they do when working near water. Unfortunately, liberal interpretation of the Longshoremen's Act by administrative law judges, benefits review board, and even some appeals courts, have greatly contributed to the proliferation of claims for Longshoremen's Act benefits by injured employees of construction contractors, as well as adding confusion as to whether or not an employee is covered by the act. These bodies, through seemingly one-sided reasoning, have extended the act to include more and more employees. This has resulted, unfortunately, in confusion, liability, and increased costs. An example of this was in the early stages of the Tennessee Tombigbee project, where it was determined that it was going to be a future navigable stream. At the time, there was no floating equipment of any nature that had been utilized, and yet, claims were paid under the Longshore Act at the Aliceville lock and dam, Gainesville lock and dam, and lock A, at Amery, Miss. The basis for paying these was since it was a future navigable stream, work on it or adjacent to it was included under the act.

At present, construction contractors must carefully analyze each project to ascertain if Longshoremen's Act exposures are present. Unfortunately, since there is no hard, fast requirement or reason for Longshoremen's Act exposure in construction operations, due to ambiguity of the law, the contractor accepts a needless business risk in either including the expensive insurance coverage in his bid, increasing its monetary size and susceptibility to being underbid, or going without the insurance coverage and exposing his firm to large financial loss from an injured employee's claim for Longshoremen's Act benefits.

An example of this confusion is an amendment of a solicitation for bid for a diving contract that our own Corps of Engineers has issued. Unfortunately, we have received this example too late for inclusion in our formal statement, but I will read it now to illustrate my point. It states:

> A contracting officer herein waives the requirement that evidence of compensation for Longshoremen's and Harbor Worker's Act be provided. This is not a declaration by the contracting officer that the Longshoremen's and Harbor Worker's Act is not applicable. Whether the Act is or is not applicable to this contract must be determined by the contractor.

We will provide a copy of this amendment to your subcommittee staff for their information.

Construction contractors are required by State statute to provide workers' compensation for their employees. Despite this coverage for employees, contractors, in order to protect themselves against liberal interpretations of the act, must increase their bids by the amount of premiums for longshoremen's coverage. The cost for this insurance coverage far exceeds that for workers' compensation coverage which is required by the State. This coverage could add anywhere from 1 to 7 percent to the cost of a project.

An example of this, Mr. Chairman, is a project that we are bidding this week in the State of Louisiana, with various classifications of pile driving, steel erection and concrete construction. Under workmen's compensation in the State of Louisiana, for pile driving, it is $22.73 per 100; the longshoring quote for that work is $48.19; steel erection, under the State law, is $18.91; the longshoring coverage is $40.09; concrete construction, State compensation is $10.10, and the longshoring is $21.41.

Senator NICKLES. Mr. Massman, can I interrupt you? We are running short on time, and I have two or three questions I would like to ask each of you, and I am sure Senator Williams does, and then we are going to have to scoot.

You are comparing those rates. Are you doing work in navigable waterways, or are you doing work close to them, or what?

Mr. MASSMAN. I was going to continue with what our broker had told us the feelings of the underwriters.

> During the conversation, you mentioned that you wanted to use a U.S. percentage of 50 percent on this job. However, as you described the job, the entire payroll would be subject to 100 percent USL rates. Apparently, one-half of the job will be performed from floating equipment, and the other half will be on a dock to be used in navigable commerce. At this time, we have nothing to negotiate with the underwriters on in an attempt to use a USL percentage of less than 100 percent. If there is some misunderstanding, please give us a call.

The essence of this is that floating equipment in construction is a work platform. We have always felt, as mentioned earlier, that the docks are an extension of the land, and working on that should be covered under State compensation, the same as working on a platform. These people, their occupations are not traditionally longshoring operations. They are construction workers, and they would perform this work whether it be on a barge, erecting a new addition, a bridge pier or a dock—they do the same work there as they would do on land.

[The prepared statement of Mr. Massman follows:]

Testimony of
The Associated General Contractors of America
Presented to the
Subcommittee on Labor of the
Committee on Labor and Human Resources
United States Senate
June 17, 1981
On the Topic of
Amendment of the U.S. Longshoremen and Harbor
Workers Compensation Act
Presented by Robert J. Massman

AGC is:

- More than 30,000 firms including 8,400 of America's leading general contracting firms responsible for the employment of 3,500,000-plus employees;
- 113 chapters nationwide;
- More than 80% of America's contract construction of commercial buildings, highways, industrial and municipal-utility facilities;
- Approximately 50% of the contract construction by American firms in more than 100 countries abroad.

My name is Robert Massman, and I am a construction contractor from Kansas City, Missouri. I am here today representing the Associated General Contractors of America, a trade association representing 8,400 general contractors.

General contractors, particularly those involved in the construction of facilities on or over navigable water, have been aware of the United States Longshoremen's and Harbor Workers' Act for some time. It was not until recently, however, that the Longshoremen's Act became an ever-increasing problem not only for construction contractors who work on or over navigable water but also for contractors who work near water.

Jurisdiction Matters

Claims for Longshoremen's Act benefits by employees of contractors who operate on, over, or near water have increased greatly since the 1972 amendments, as has the scope of exposure as to what sites are, or what sites could be, construed to be included under the Act. In most situations, the contractor is unaware that he is faced with a Longshoremen's Act exposure; nor, we believe, should a construction contractor have any reason to expect that his operations are subject to the Longshoremen's Act.

We suggest to this Subcommittee that the definition of maritime employment, as it appears in the Longshoremen's Act, was never intended to cover construction operations. Construction is certainly not, nor should it be construed as, maritime employment. Employees injured in the course of their employment while working for a construction contractor perform the same duties inland as they do when working near water.

Court of Appeals decisions support our position. In the Conti v. Norfolk and Western Railway Company case, the Court found that the plaintiff's occupation was not of a traditionally maritime nature, but was that traditionally associated with railroading. More recently and more related to construction, the Second Circuit Court of Appeals made a similar decision.

Also supporting our view that construction should not and was not intended to be included under the Longshoremen's Act is the opinion by Judge Winter for the panel majority in the ITO Corporation of Baltimore v. Benefits Review Board. In this opinion, Judge Winter summarized the legislative history and background of the 1972 amendments to the Longshoremen's Act as follows:

> Section 2 and 3 of the present Act establish a dual test for coverage. The situs requirement has been retained, with the definition of "navigable waters" expanded to include certain specified land areas. In addition, a new "status" test has been added: the person injured ("employee") must have been engaged in "maritime employment," a concept which is nowhere defined but which includes "longshoring operations." The net effect of the 1972 Amendments was therefore to broaden the area in which an injury would be covered, and narrow the class of persons eligible to job function. Id. 1083.

Clearly, construction is not a maritime or a longshoring operation, but rather the process of assembling material and building a structure.

The legislative history of the 1972 Amendments also indicates that Congress never considered, nor did it intend, that the construction industry should fall under the purview of the Longshoremen's Act.

The logic behind the Congress' intent to expand coverage through the Amendments was to provide coverage for a worker who is not continuously engaged in Longshoring activity, but who spends some portion of his time in an employment satisfying the definition of maritime employment. However, merely because a worker is assigned to work on or over navigable water does not guarantee Longshoring status within the intent of the law. An employee whose primary occupation is construction work and who does not spend any portion of his time engaged in Longshoring activity should not be considered eligible for USL&H status.

Unfortunately, liberal interpretation of the Longshoremen's Act by administrative law judges, benefit review boards, and even some Appeals Courts have greatly contributed to the proliferation of claims for Longshoremen's Act benefits by injured employees of construction contractors as well as adding confusion as to whether or not an employee is covered by the Act. These bodies, through seemingly one-sided reasoning, have extended the Act to include more and more employees. This has resulted, unfortunately, in confusion, liability, and increased costs.

Confusion in Bidding

At present, a construction contractor must carefully analyze each project to ascertain if Longshoremen's Act exposures are present. Unfortunately, since there is no hard, fast requirement or reason for Longshoremen's Act exposure in construction operations, due to ambiguity of the law, the contractor accepts a needless business risk in either including the expensive insurance coverage in his bid, increasing its monetary size and susceptibility to be underbid, or going without the insurance coverage and exposing his firm to large financial loss from an injured employee's claim for Longshoremen's Act benefits.

An illustration of the confusion caused by the Act is the situation where a highway contractor must bridge several streams of wading depth during the execution of a highway contract. Clearly, these streams are not capable of carrying commercial traffic but are instead only suitable for pleasure and recreational boating at most. The question to the contractor is whether he should add to his bid the extra price for insurance to cover the possible Longshoremen's Act exposure. As absurd as this example may seem, a contractor was actually confronted with it when his insurance agent advised him to secure coverage for these possible exposures.

Increased Cost for Longshoremen's Premiums

Construction contractors are required by state statute to provide workers' compensation for their employees. The cost for this coverage is a reflection of benefit levels established by the states and the loss experience of the contractor. Despite this coverage for employees, contractors, in order to protect themselves against liberal interpretations of the Act, must increase their bids by the amount of premiums for Longshoremen's coverage. The cost for this insurance coverage far exceeds that for workers' compensation coverage which is required by the state. For example, the rates for USL coverage were 252 percent higher than workers' compensation rates for a project bid in the state of California. When it is taken into consideration that workers' compensation premiums account for approximately 5 percent of a contractor's bid, the cost for this project in the California example was increased by approximately 7 percent. In the state of Florida, rates for Longshoremen Act coverage are 160 percent higher than the rates for state compensation.

Even if a contractor only has minimal exposure to a possible Longshoremen's Act condition, he must carry an endorsement to his workers' compensation policy. This endorsement can usually be obtained at no cost. However if a claim is ever made on this endorsement, Longshoremen's Act premiums are then assessed against the contractor who must, by necessity, reflect the cost of those premiums in his bids on future work.

Disparity Between State Programs & U.S. Longshoremen's Act

If the levels of compensation between state compensation rates and those of Longshoring activities remain excessively different, then the injured construction worker is thereby provided with a strong incentive not to return to work. The Congress, we are sure, did not intend to create a counterproductive compensation law that encourages malingering.

A further incentive to remain on Longshoremen's Act compensation is provided by the annual cost-of-living adjustment tied to the increase in the average national wage.

In addition, the uncertainty as to the future rates of inflation and the 15 or 25 year payout found in many cases, makes the setting of reserves to cover potential losses a guess at best and an unnecessary risk for any businessman. The nature of the construction business is such that it cannot stand the burden of a vague and ill defined law with such disparity between its compensation levels and those provided by the various state compensation laws.

Availability of Coverage

Not only does confusion reign in determining whether or not a construction contractor has exposure created by the Act, but the contractor has great difficulty in obtaining coverage for the obligations created by Longshoremen's Act.

The reason given to us by the commercial insurers for not insuring possible Longshoremen's Act exposures in construction is that the Act provides open-ended benefits which, we are told, make it virtually impossible for underwriters to determine future costs and, therefore, determine the proper price for coverage. In essence, that which is unfixed, is unratable and hence unavailable to construction contractors.

This unavailability of insurance for possible Longshoremen's Act exposures, which was at crisis proportions only two years ago and could occur again, has not been limited to any geographic area but is spread throughout the United States. Contractors are faced with the dilemma of broadened Longshoremen's Act exposure, mandated by liberal Department of Labor administrative law judges' and benefit review boards, and fewer insurance markets to approach to insure the expanded exposures.

In order to remedy the situations of unavailability of coverage, greatly over-expanded purview of the Longshoremen's Act, and the confusion, liability and increased costs it creates, we respectfully recommend that this Subcommittee take action to prevent any further misapplication of the Act by effectively removing construction from the definition of employers under the law.

To accomplish this task, AGC strongly supports S. 1182 and urge that prompt action be taken on this bill.

(816) 842 49[illegible]

Thomas McGee & Sons
INSURANCE AND SURETY BONDS
COMMERCE TOWER • 911 MAIN STREET • KANSAS CITY, MIS[illegible] • [illegible] BOX 133[illegible]

June 4, 1981

Mr. David Boyce
Massman Construction Company
P. O. Box 8458
8901 State Line
Kansas City, Missouri 64114

RE: Continental Grain West Wego, Louisiana
Bid Date June 8, 1981

Dear Dave:

Shown below are the Worker's Compensation and United States Longshoremen's and Harbor Worker's Act rates by classification, as you requested in our conversation of June 1. These are current rates and reflect 1.17 experience modification factor and 11.4% premium discount.

		WC	USLHW
Pile Driving	#6003	$22.73	$48.19
Steel Erection	#5057	18.91	40.09
Concrete Construction	#5213	10.10	21.41

Payroll limit in Louisiana is still $300 per week per man for compensation and USL.

During the conversation, you mentioned that you wanted to use a USL percentage of 50% on this job. However, as you describe the job, the entire payroll will be subject to 100% USL rates. Apparently, one-half of the job will be performed from floating equipment; and the other half will be on a dock to be used in navagable commerce.

At this time, we have nothing to negotiate with the underwriters on, in an attempt to use a USL percentage of less than 100%. If my understanding of the job is not clear, or if the method of construction should change so that we might have room to negotiate, please give me a call.

Yours very truly,

THOMAS McGEE & SONS

By Jack Williams

Jack H. Williams
Manager, Casualty Department

JHW:sbo

cc: Mr. H. J. Massman, III

Your Insurance Protection Is Our Business

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

Page 1 of 4

ONE (0001)

81JUN04

WAE109

DEPARTMENT OF THE ARMY
SEATTLE DISTRICT, CORPS OF ENGINEERS
P.O. BOX C-3755
SEATTLE, WASHINGTON 98124

7 CONTRACTOR NAME AND ADDRESS CODE FACILITY CODE

(Street, city, county, state, and ZIP Code)

8

☒ AMENDMENT OF SOLICITATION NO. DACW67-81-B-0033

DATED 81MAY28

☐ MODIFICATION OF CONTRACT/ORDER NO.

DATED

9 THIS BLOCK APPLIES ONLY TO AMENDMENTS OF SOLICITATIONS

[illegible] ☐ is extended ☒ is not extended.

[illegible] FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE ISSUING OFFICE PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. [illegible]

10 ACCOUNTING AND APPROPRIATION DATA (If required)

PROJECT: NON-PERSONAL DIVING SERVICE, EFFECTIVE MILFOIL PLANT REMOVAL STUDY, UPPER OKANOGAN RIVER, WASHINGTON

11 THIS BLOCK APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS

(a) ☐ This Change Order is issued pursuant to ______
The Changes set forth in block 12 are made to the above numbered contract/order.

(b) ☐ The above numbered contract/order is modified to reflect the administrative changes (such as changes in paying office, appropriation data, etc.) set forth in block 12.

(c) ☐ This Supplemental Agreement is entered into pursuant to authority of ______
It modifies the above numbered contract as set forth in block 12.

12 DESCRIPTION OF AMENDMENT/MODIFICATION

This amendment provides for a change in Insurance Requirements as follows:

1. SECTION B - SUPPLIES/SERVICES AND PRICES, Page B-1, paragraph titled INSURANCE and SECTION H - SPECIAL PROVISIONS, page H-1, paragraph 1.4 are changed to read as follows:

"The Contracting Officer herein waives the requirement that evidence of compensation for Longshoreman and Harbor Workers Act be provided. This is not a declaration by the Contracting Officer that the Longshoreman and Harbor Workers Act is not applicable. Whether the Act is or is not applicable to this contract must be determined by the contractor."

2. Bid opening time and date of 2:00 p.m., Pacific Time, 81JUN18, remains unchanged.

3. NOTICE TO BIDDERS: PLEASE MARK OUTSIDE OF ENVELOPE IN WHICH BID IS MAILED TO SHOW AMENDMENTS RECEIVED.

2 Incl
1. Rev. pg. B-1
2. Rev. pg. H-1

Except as provided herein, all terms and conditions of the document referenced in block 8, as heretofore changed, remain unchanged and in full force and effect.

13 ☐ CONTRACTOR/OFFEROR IS NOT REQUIRED TO SIGN THIS DOCUMENT ☐ CONTRACTOR/OFFEROR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN ____ COPIES TO ISSUING OFFICE

14 NAME OF CONTRACTOR/OFFEROR

BY ______
(Signature of person authorized to sign)

17 UNITED STATES OF AMERICA

BY ______
(Signature of Contracting Officer)

15 NAME AND TITLE OF SIGNER (Type or print)

16 DATE SIGNED

18 NAME OF CONTRACTING OFFICER (Type or print)

19 DATE SIGNED

30-101-08

P0001 81JUN02

Senator NICKLES. Thank you.

I would like to ask Mr. Potter a question. I noticed in your statement that you mentioned your workers' compensation cost was $1.50 an hour. What kind of wage rates do you pay?

Mr. POTTER. We are right around $8 an hour.

Senator NICKLES. In Massachusetts, are all of your employees covered by the Longshoremen's Act?

Mr. POTTER. No. In other words, they can be covered, excluding the office and the administrative and watchmen, and so forth. We have the Teamsters' Union, and half of our business is roughly marine construction, similar to what this gentleman was talking about—we build bridges, we lay pipe, and so forth. The other half is ship repair or yacht repair. And under rule 21, any time anyone of our employees works on a boat, whether that boat is on dry land or whether it is in the water, they are classified as coming under the Federal Compensation Act. Similarly, any work that we do in marine construction, whether it be on a barge or whether it be afloat, that is also considered under the Federal Act.

Senator NICKLES. Someone questioned your $1.50 figure. I would think it would be a lot higher than that if it is under the Longshoremen's Act, if you are paying $8 or $9 an hour.

Mr. POTTER. Well, this is the overhead part. Eight dollars represents the direct pay before deductions to the employee. And then, on top of that, we have about a $14 or $15 overhead, and the $1.50 is roughly 10 percent of our overhead.

Senator NICKLES. I would still think if Massachusetts had—and I cannot remember what it was—let us say $50 per hundred, that you would be paying premiums somewhere to a carrier or self-insurer or whatever, and it would be in the neighborhood of $4 or $5, not $1.50.

Mr. POTTER. Well, our carrier—any work that we do, for instance, on the buildings or on maintenance of equipment and so forth is considered under the State act, which helps our costs quite a bit.

Senator NICKLES. I appreciate that.

One other question, to Mr. Buursema. Are you from St. Paul?

Mr. BUURSEMA. Yes, sir.

Senator NICKLES. I think in the back of your testimony, if I remember glancing at it, there were several firms that basically have left. Is that correct, or am I getting you mixed up with somebody else's testimony that I have read?

Mr. BUURSEMA. No. That is right. I have a list in the back of the testimony.

Senator NICKLES. Yes, here it is. You have listed the number of companies that are out of the shipbuilding and shiprepair business between 1970 and 1980.

Mr. BUURSEMA. Yes, sir.

Senator NICKLES. Do you feel that one of the major reasons that they are out of business is because of the rapid cost of compensation under the Longshoremen's Act?

Mr. BUURSEMA. That is a considerable reason for their demise, yes. Most of them went bankrupt. Some could not get the insurance anymore; self-insurance was impossible. Most of these yards that are listed are smaller yards.

Senator **Nickles**. Smaller yards that were too small and probably did not have the assets——

Mr. **Buursema**. From 10 to 50 people were involved.

Senator **Nickles**. They did not have the resources to self-insure, and they could not find insurers that would give them coverage?

Mr. **Buursema**. That is right.

Senator **Nickles**. Senator Williams.

Senator **Williams**. I have a couple, Mr. Chairman.

Mr. Massman, in the construction area, do you dispute the proposition that construction occurring over navigable waters should be covered under Longshore?

Mr. **Massman**. Yes, sir.

Senator **Williams**. You do?

Mr. **Massman**. I do.

Senator **Williams**. And that would put it back——

Mr. **Massman**. Into the State compensation.

Senator **Williams** [continuing]. In the coverage as defined by the Supreme Court. The Supreme Court would then leave these people without any coverage.

Mr. **Massman**. No. They would be covered by State compensation.

Senator **Williams**. I think that would be another Supreme Court decision because, as I understand it, that was one of their decisions. Am I right on this? If you get over navigable waters, my friend, you are excluded from Longshore, where the Supreme Court said you are as it is now, and the law has changed to knock that out. Then you are in that "never-never-land, unless the Supreme Court does a little legislating.

Senator **Nickles**. I might mention that under our existing legislation, any construction done over navigable waters would be covered by the Longshoremen's Act.

Senator **Williams**. But Mr. Massman would have it otherwise.

Senator **Nickles**. True. He prefers to have that changed.

Senator **Williams**. There is a question here about how the motivations to the 1972 amendments that we passed came about. You know, there were give-ups on this—the unseaworthiness tort claim was given up for this no-fault and exclusive under the Longshore.

If we go back to the old remedies, do we want to go back to the tort claim options? Have you thought this one through, any of you?

[No response.]

Senator **Williams**. Evidently not. I am telling you, there could be a problem here.

Mr. **Massman**. Are you referring to the Jones Act?

Mr. **Buursema**. Are you referring to the stevedoring or to the shipyards, sir?

Senator **Williams**. Wherever it might be applicable. I would think even in shipbuilding, probably there would be an opportunity—don't your shipbuilders once in a while get on the ship when it is in the water?

Mr. **Buursema**. Sir, we build barges, and none of the people who are on the barge, who build the barge, have ever touched the water or were over the water.

Senator **Williams**. Never do what?

Mr. **Buursema**. They never go over the water or touch the water. We build barges inside a huge fabricating plant. When it moves out, it moves out mechanically, and it goes mechanically into the water, and that is the end of the story. A towboat picks the barge up and goes off. None of our bargebuilders or shipbuilders are ever over the water, as such—unlike the ship repairmen, as was specified before 1972.

Senator **Williams**. Your operation, you think, would never present that question?

Mr. **Buursema**. No, sir.

Senator **Williams**. I would think in some shipbuilding situations, that question could arise.

Mr. **Buursema**. I am sure of that.

Senator **Williams**. That will be further explored.

I have nothing further, Mr. Chairman. Thank you.

Senator **Nickles**. Thank you, Senator Williams. I look forward to working with you and hopefully, making some changes. Gentlemen, we appreciate your interest, coming from great distances, and sharinq with us your experiences.

Next Tuesday at 9:30, we will have Bob Collier, from the Department of Labor and Congressman John Erlenborn, who sponsored H.R. 25. We will have individuals from the insurance industry, and we will also have individuals from the AFL-CIO building trades unions.

This meeting is adjourned. Thank you.

[Whereupon, at 1:22 p.m., the subcommittee was adjourned, to reconvene Tuesday, June 23, 1981, at 9:30 a.m.]

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1981

TUESDAY, JUNE 23, 1981

U.S. SENATE,
SUBCOMMITTEE ON LABOR,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:33 a.m., in room 4232, Dirksen Senate Office Building, Senator Don Nickles (chairman of the subcommittee) presiding.

Present: Senators Nickles and East.

Senator NICKLES. Good morning, ladies and gentlemen.

Today, we are beginning our third day of hearings on Senate bill 1182, the Longshoremen's and Harbor Workers' Compensation Act. Today, we have three panels—two insurance panels and a panel representing the trade union group—some people probably for this legislation; some people probably against it, and hopefully, people with some constructive ideas on how we can make this legislation more workable.

I told someone not too long ago that it is definitely my intention, and I think that of Senator Hatch and others in Congress today, to make some changes. I think almost everyone would agree that some changes need to be made. It is also our desire not to have to come back in here 2 years from now and undo some of the changes that we are about to undertake. We very openly and sincerely seek and solicit advice from all sides on how we can make amendments to the current legislation that are both workable and fair for the working men and women so they can receive adequate and just compensation for their injuries, and also a fair and equitable program for the employers, who are basically going to have a compensation program that is insurable and affordable and will once again restore competitiveness to American ports internationally, as well as being an asset to those port facilities.

We also have as our guest today, who will appear after this initial panel, Congressman John Erlenborn, who has a considerable amount of expertise.

I see that our first panel is ready to go. If you would, gentlemen, please identify yourselves so I will know whom I am talking to.

Mr. SNODGRASS. My name is Paul Snodgrass. I represent the Independent Insurance Agents of America.

Senator NICKLES. You are from where, Paul?

Mr. SNODGRASS. I am from Washington, D.C.

Senator NICKLES. OK.

Mr. **Blum**. My name is Dan Blum. I am with the Insurance House in Lafayette, La., and I represent the Professional Insurance Agents.

Mr. **Leavitt**. Mr. Chairman, I am Bert Leavitt of the Leavitt Insurance Company in Las Vegas. I am chairman of the National Insurance Producers Conference, and also President of the National Association of Professional Insurance Agents.

Mr. **Eblen**. Senator, my name is Frank Eblen. I am with Johnson & Higgins in New York City, representing the National Association of Insurance Brokers.

Mr. **Cornay**. Mr. Chairman, I am Howard Cornay, Jr. I am with the Bayly, Martin & Fay organization. I live in Lafayette, La., and I am here today as a representative of the National Association of Casualty & Surety Agents.

Senator **Nickles**. Were one of you going to act as a spokesman for the entire panel?

Mr. **Leavitt**. Mr. Chairman, I will lead off with a statement and then each of the other members may have a statement of their own.

Senator **Nickles**. I would like to ask all of our guests today to keep their statements to 5 minutes, in view of the fact that we do have several people and also because of the fact that we are in session considering the reconciliation bill, which is a 2,000-page bill and a fairly extensive piece of legislation. I will not say that all Members of the Congress have read it; this one has not. But we are considering it and it is very important, and so we will try to move this hearing along. If you know me, I like to move along anyway.

I think Senator Williams will be joining us shortly—and possibly other members of the subcommittee—to get a few questions in on the hearing record. We probably will not have time to get all of the questions into the record, but we will submit additional questions to you.

If all of our guests would please adhere to the 5 minutes per guest, we would appreciate that very much.

STATEMENTS OF BERT J. LEAVITT, PRESIDENT, LEAVITT INSURANCE AGENCY, LAS VEGAS, NEV., CHAIRMAN, NATIONAL INSURANCE PRODUCERS CONFERENCE, AND PRESIDENT, NATIONAL ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS; FRANK L. EBLEN, VICE PRESIDENT, JOHNSON & HIGGINS, NEW YORK, N.Y., AND MEMBER, NATIONAL ASSOCIATION OF INSURANCE BROKERS, INC.; HOWARD J. CORNAY, JR., SENIOR VICE PRESIDENT, BAYLY, MARTIN & FAY, INC., LAFAYETTE, LA., AND MEMBER, NATIONAL ASSOCIATION OF CASUALTY & SURETY AGENTS; PAUL D. SNODGRASS, RALPH W. LEE & CO., WASHINGTON, D.C., PRESIDENT, METROPOLITAN WASHINGTON INDEPENDENT INSURANCE AGENTS, AND MEMBER, INDEPENDENT INSURANCE AGENTS OF AMERICA, INC.; AND DANIEL J. BLUM, PRESIDENT, INSURANCE HOUSE, INC., LAFAYETTE, LA., AND MEMBER, NATIONAL ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS, A PANEL

Mr. **Leavitt**. Senator Nickles, the National Insurance Producers Conference is a conference made up of the five major producer organizations that operate within the United States.

Senator **Nickles**. Could you pull the microphone up real close? Thank you.

Mr. **Leavitt**. The chairmanship of the NIPC changes annually, and it happens that this year the professional insurance agents are represented in this seat.

The National Insurance Producers Conference has unanimously agreed to support efforts in Congress to reform the Longshoremen's and Harbor Workers' Act by passage of Senate bill 1182 and House Resolution 25.

The act was first passed in 1927 because work sites over navigable waters, which are subject to exclusive Federal jurisdiction, prevented many workers from qualifying under State workmen's compensation programs. Over the years, the act has been amended several times.

The problems and the legislation that are the subject of these hearings stem from amendments passed in 1972 which increased the act's tax-free benefits to 200 percent of the national average weekly wage. It also provided for an unlimited escalation of benefits and extended survivor benefits to cover deaths which are not job related.

Some beneficiaries now take in more money under this compensation program than they would receive as wage earners. Thus, there is frequently no incentive to return to work or to pursue rehabilitation. Injured workers, who, if properly supervised by the Department of Labor, would be rehabilitated and returned to the work place, are instead out of work, receiving tax-free benefits, with an unpredictable annual escalation based on increases in the national average weekly wage.

A major problem has been the liberal court and administrative interpretations of the act's jurisdiction. The act provides benefits to workers never intended by its authors. Inland workers and over-the-water workers, like offshore oil rig workers, are covered by the act, which in 1927 was intended only for longshoremen and harbor workers.

In 1928, the District of Columbia was placed under the act because no other plan was available to them. These unpredictable and liberal interpretations of the act's jurisdiction, its high benefit levels and its poor administration under the Department of Labor have all contributed to skyrocketting insurance costs. Longshore benefits are so high that employers have gone out of business because they could no longer afford to insure their risk and stay in operation.

The annual cost of coverage for one general stevedore in New York State, for example, is over $21,000—more than the typical American earns in 1 year. It is rapidly becoming an uninsurable risk. Therefore, the act has had a direct impact on employment. Most employers pass this high cost on to consumers. U.S. manufacturers have been at a competitive disadvantage with those who do not face the cost burdens of the Longshoremen's Act.

NIPC members support equitable compensation for injured workers. However, we do not believe that compensation programs should be a substitute for unemployment benefits or used as pension plans. The Longshoremen's Act needs reform. It should be amended to tighten its jurisdiction, bring balance to the system of benefits, reform administration of the act, and assure a competitive insurance market. We trust that your committee will support reform of the act and urge the expeditious passage of S. 1182.

Mr. Chairman, all of the panel members have extensive personal experience producing insurance coverage under the influence of the 1972 amendments. They have dealt with the harsh realities involved in obtaining Longshore Act insurance coverage for their clients under current market conditions, and they have experienced first-hand the economic pressures and frustrations to which their clients are subjected as they attempt to comply with the requirements of this compensation program, and they await your inquiries.

Senator NICKLES. Thank you very much, Mr. Leavitt.

Mr. Snodgrass or Eblen?

Mr. EBLEN. Senator, the National Association of Insurance Brokers has submitted to your committee their statement of their support of this bill. Attached to that statement are several pages in which I indicated some of the problems that I personally experienced as a producer of this business. I see no need of reading those statements again, sir.

Senator NICKLES. Thank you; I appreciate it. All of the statements, gentlemen, will be entered into the record. I would much prefer instead of you reading your statements, to hear your personal comments on the legislation, and particularly your comments concerning areas where the legislation may be improved. There has been a great deal of controversy on particular sections of the program, such as compensation eligibility—who should be eligible, and so on.

There are a variety of issues that are abounding in this legislation, whether we go to the two-thirds of gross or whether we go to 80 percent of net, and on and on; whether or not death benefits should be related to the injury or not.

What we are looking for is your priority on the changes which you think we could make that would be fair and equitable for all parties concerned.

Your statements will be entered, and I appreciate your not reading them to me. I have read the statements, incidentally.

Frank?

Mr. EBLEN. All right, Senator. One of the biggest problems that the producers face is the fact that the market has shriveled up and withdrawn because of the 1972 amendments problem.

Basically, there is not a way for the insurers to cap their reserves or to predict exactly what the payout is going to be. This is one of the problems that they weigh among many others, in not being able to offer a market for producers to offer to their clients. It has been a forced issue in many cases because the assigned risk plans are forced to accept the policies that are submitted to them, providing little or no service because of the way the assigned risk plans operate.

It has compelled many of the buyers to seek other risk management alternatives, such as self-insurance. Self-insurance retentions, because of the nature of the marketplace, have been forced into 100 to 500,000 levels.

In the areas where there is availability of coverage, it is questionable whether these coverages are affordable, because the open-writing laws in certain States permit surcharges of 200, 300, or higher percentages.

These are some of the problems, generally, that producers run into.

Senator NICKLES. Mr. Cornay, do you have any comments you wish to make?

Mr. CORNAY. Howard Cornay, Senator.

I concur with Mr. Eblen's statement. As the representative of the National Association of Casualty and Surety Agents, the statement of our president, Mr. Gerald Cassidy, in letter form to you, is entered into the record.

As a matter of personal experience and discussions with underwriters of insurers, it would seem that a fixed limitation of death benefits, with that death benefit being related to the work injury, would aid in making the law and consequential insurance predictable and ratable. So, the point is well taken in that regard.

Senator NICKLES. Thank you.

Mr. Snodgrass?

Mr. SNODGRASS. My name is Paul Snodgrass and I am an independent insurance agent here in Washington, D.C. with Ralph W. Lee and Co. I also serve currently as the president for the Metropolitan Washington Association of Independent Insurance Agents.

My written statement provides the details of our concerns, and I would like to highlight just two points. First, the availability of workers 'compensation coverage in Washington, D.C. has been diminished because of the problems with the Longshoreman and Harbor Workers' Act. For example, the restricted underwriting by the insurance companies is the natural and inevitable result of their observations of benefit abuse and uncapped escalation features.

Second, the affordability of workers' compensation coverage in Washington, D.C. has been diminished because of the escalating insurance rates for the coverage, which are much higher here than in nearby Maryland or Virginia. Again, for example, the general carpentry construction workers 'compensation rate in D.C. is $26.44 per $100 of payroll, while in nearby Maryland, it is $8.78 per $100 of payroll.

With respect to coordination of benefits, our preference would be to maintain the primacy for workers' compensation benefits.

I appreciate the opportunity to appear before you.

[The prepared statement of Mr. Snodgrass follows:]

PREPARED STATEMENT OF PAUL D. SNODGRASS ON BEHALF OF THE INDEPENDENT INSURANCE AGENTS OF AMERICA, INC.

Mr. Chairman, members of the Subcommittee on Labor, my name is Paul D. Snodgrass and I appear before you in behalf of the Independent Insurance Agents of America, Inc. (IIAA). I currently serve as President of the Metropolitan Washington Association of Independent Insurance Agents (MWAIIA). I would like to thank you, in behalf of IIAA, for inviting me to testify on S. 1182, the Longshoremen's & Harbor Workers' Compensation Act (LHWCA).

IIAA is composed of about 126,000 independent businessmen — the owners, principals or licensed agents of 34,000 agencies selling and servicing property/casualty coverage in virtually every community in the United States. Naturally, a significant portion of IIAA's membership is directly affected by the provisions of the Longshoremen's & Harbor Workers' Compensation Act.

While members of IIAA are adversely affected by this statute nationwide, as an insurance agent doing business in the District of Columbia, I want to focus your attention on a particular aspect of the problem-ridden Longshoremen's & Harbor Workers' Compensation Act. As Senator Nickles noted in his opening statement, private business employers here in Washington are provided workers' compensation coverage under this Act. As a consequence, the general distortions, displacements and inequities already noted by previous witnesses, play themselves out in a microcosm here in the metropolitan area. Allow me to explain.

Two critical factors affecting the ability of insurance agents to meet the insurance needs of their clients are the availability and affordability of coverage. How has the LHWCA affected these factors in the Metropolitan area with regard to workers' compensation coverage?

In recent years, and especially since the 1972 Act amendments, insurance companies have been extremely timid about accepting, or continuing virtually any kind of workers' compensation account which involves coverage of employees in the District of Columbia. Why? This restrictive underwriting practice is the natural and inevitable result of insurance company observations of benefit abuse, uncapped escalation features and the other elements of this law, already noted by others, which can only cause an underwriter to hesitate before plunging in to embrace the uncertain, albeit, dire financial consequences.

The "botton line" of this conservative outlook has been a lessening of availability of an open market for workers' compensation coverage in Washington. This completely frustrates the ability of an insurance agent to effectively service his client. Depending upon the nature of the account, its loss record, and the persuasiveness of the insurance agent with an insurance carrier, many businesses have been forced to obtain coverage from the assigned risk plan, or to unwillingly self-insure.

In short, availability of workers' compensation coverage in Washington has diminished because of the problems inherent in the LHWCA.

The other important objective in meeting private employer consumer needs involves the affordability of the insurance.

The metropolitan Washington area is one community for those of us who live and work in this region. To be sure, there are differences in such things as taxes and services, which provide a choice for one to decide where he wants to reside and where he wants to establish his business. But, one of the most significant differences throughout the Washington area is the cost of workers' compensation insurance. The expanding skylines of Crystal City and Rosslyn are monuments to this differential. Some illustrations will clearly demonstrate this. (See Appendix #1)

Hotels in Washington must pay a workers' compensation rate twice that of hotels in Maryland and almost three times the rate for Virginia. This higher cost affects the millions of visitors who stay in our City each year.

Automobile dealers, of which there are only a few left in the City, must pay a workers' compensation rate of $10.56 per $100.00 of payroll, compared to $3.35 for Maryland and $2.50 for Virginia; that is, over four times more than in Virginia.

Clerical office employees, of which there are thousands here in the City, are subject to a workers' compensation rate of $.62 per $100.00 of payroll, compared $.34 for Maryland and $.22 for Virginia.

Construction work is yet another major industry affected. The D.C. rate for general carpentry is $26.44, while Maryland is $8.78 and Virginia is $6.64. Senator Nickles noted in his statement the all too familiar fact, "that for every mile of track laid in the D.C. Metro system, employers paid $1.9 million in workers' compensation."

Concrete work, such as required for erection of new buildings here, public or private, is $34.73 per $100.00 of payroll, compared to $15.90 for Maryland and $9.19 for Virginia. Even the service call of an electrician is affected. In Washington, the workers' compensation rate is $15.87, while in Maryland, it is $7.23 and in Virginia it is $4.07. These higher insurance costs for workers' compensation are passed on to all of us whether we are tourists, residents, Congressmen and Senators or employees of the federal government.

Some metropolitan area businesses will not provide services in the District of Columbia because of the high cost of insurance. Other businesses have moved out of the City because of the high cost of insurance. Some opponents of S. 1182 have suggested that the increase in claims the length of absenses and benefits under the LHWCA, are directly related to the hazardous nature of longshoring and dockside employment. Well typing in D. C. is no more hazardous than typing in Arlington, Virginia — yet, the workers' compensation rates are three times higher! Such differentials cannot be explained away by emotional testimony about the hazards of longshoring. Indeed, I believe the repercussions this program has had in D.C. place it's true costs and inconveniences in proper perspective.

Since the 1972 Amendments, premium volume has increased seven-fold, from $15 to $100 million. This, has occurred despite the fact that there has been no significant change in the number of injuries or accidents and the fact that OSHA statistics list D.C. as one of the safest jurisdictions in the nation.

Independent insurance agents in this area, and those throughout the United States, wholeheartedly support a major revision of the LHWCA — as would be accomplished by S. 1182 and H.R. 25. The purpose of a workers' compensation system is to compensate an employee for wages lost as a result of an injury. A workers' compensation program is not a pension plan nor is it a life insurance policy. No properly functioning workers' compensation program should encourage workers to remain off the job or discourage them from seeking rehabilitation. No insurance program should be so unpredictable that it literally scares away insurance carriers from underwriting it; nor so expensive that it becomes a critical factor in whether or where an employer goes into business.

The Longshoremen's and Harbor Workers' Compensation Act suffers from all these faults. A prompt revision is in order; especially one that reverses the skyrocketing costs and unwarranted "benefits" and that satisfactorily addresses the lax administration of this bill.

In registering our strong support for S. 1182, IIAA must note one area of concern. The coordination of benefits provision of this bill would set-off workers' compensation benefits first — giving primacy to social security disability insurance benefits. This runs contrary to custom and sound public policy and indeed is inconsistent with the current Administration's policy on Social Security coordination of benefits. We would hope that you would reconsider this clause, especially in light of the Administration's position.

Again, in behalf of IIAA, I thank you for this opportunity to put our views on record concerning a very troubled and troublesome law.

APPENDIX #1

COMPARATIVE
WORKERS' COMPENSATION RATES
PER $100 OF PAYROLL *

	D.C.	MD.	VA.
Hotels (Code 9052)	5.42	2.75	1.64
Auto Dealers (Code 8391)	10.56	3.35	2.50
Clerical Employees (Code 8810)	.62	.34	.22
Carpentry N.O.C. (5403)	26.44	8.78	6.64
Concrete Const. N.O.C. (5213)	34.73	15.90	9.19
Electrical Wiring (5190)	15.87	7.23	4.07

*District of Columbia Workers' Compensation Rating Manual

Senator NICKLES. Thank you very much.

Mr. Blum?

Mr. BLUM. Thank you, Mr. Chairman.

In our survey of our agents, who are members of the National Association of Professional Insurance Agents, we found that one of the major problems caused by the 1972 amendments has to do with the imprecise and inconclusive language that extended the act's jurisdiction, and we found many problems dealing with this in Louisiana.

In an attempt not to be repetitious, I will just briefly mention three other areas that we feel are very important, and that is unrelated death benefits, which can really lead to a lot of abuse and a lot of additional payments by insurers; secondly, the unlimited death benefit, which is really no more than a life insurance program which we feel has no place whatsoever in a compensation plan; and, third, the present system, which has no cap on the cost-of-living adjustment which, if it is done according to the present system, can be catastrophic to the insurance companies.

Thank you, Mr. Chairman.

Senator NICKLES. Thank you, gentlemen. I will ask a couple of questions.

All of you have mentioned the fact of limited access to the market; in other words, you are having a hard time finding underwriters. How hard is it to find someone to underwrite, say, in New York or in Washington, D.C. or in other areas for XYZ company, where their existing company possibly would not extend or they are shopping around because the rates are so high that changes need to be made?

Just how difficult is it for XYZ employer to find someone to underwrite this?

Mr. EBLEN. Senator, the larger buyers—those that are paying $200,000, $300,000, $400,000 a year and more in premiums—can usually find some type of a modified self-insurance plan, like a retrospective rating or some type of an excess insurance arrangement which is tantamount to self-insurance.

I think where the problems really lie is in the area of the smaller insured, the smaller buyer, where most of the insurance companies that used to provide this coverage are no longer providing the coverage. So, in most of the jurisdictions, the smaller buyer is forced to go to the assigned risk plan or go bare—go without any insurance—contrary to the law.

My experience has been the fact that the smaller buyer is the one that is the victim in most cases. Even though the larger buyer has to pay the going rate, there is a way where he assumes a certain portion of it. It still is not the answer.

Senator NICKLES. Let me follow up just a little bit because you mentioned the smaller buyer. Let us say that the smaller buyer is in New York City or in Washington, D.C. and he does not buy. Is it he or is it the workers that he is working with that are in jeopardy?

Mr. EBLEN. Absolutely; there is no question about it. He is in violation of the law, and if an injury occurs, of course, he has the option to pay off that injury according to the law, or go bankrupt and go out of business.

Senator NICKLES. Do you know of some instances where this happened? Let us say he is a small employer; he has 25 people working with him and his annual payroll is, $400,000, or something in that neighborhood, and his compensation premiums in New York would be $300,000.

He cannot afford that, so he does not take on workers' compensation in New York City or in the harbor areas.

Mr. EBLEN. It would have to be a smaller risk than that, Senator. What has happened is that in many cases, if they have a U.S.L. & H. exposure, they will eliminate that job or eliminate that service so they will not have the exposure, because the cost of buying insurance is far more than the profit they would receive in return for doing that service, such as servicing ship-to-shore radios or some other type of service that they would perform in addition to their regular type of contractor's service that they would have.

Senator NICKLES. Basically, he would go out of business in that particular segment?

Mr. EBLEN. That is right.

Senator NICKLES. There would be a loss of a job, and here again it would be hurting the working man or woman who had the capacity to fill that job.

Mr. EBLEN. Yes, sir.

Mr. CORNAY. Howard Cornay, Senator.

Just along that line of thought, a personal observation might be of interest to you. I have been in the insurance business now right at 19 years, and our particular office has participated in the oil industry insurance coverages as they related to the off-shore gulf coast operations.

Prior to the enactment of the 1972 legislation, virtually all of our accounts which needed U.S.L. & H. coverage were written by some type of standard market—approximately 95 percent of them—the other 5 being those who had adverse loss ratios that might not be desirable even to a standard insurer.

Since the enactment of the 1972 revisions, we have found that, now, virtually all of our accounts are flipped over, and only very few of them have available to them a standard market where there may be a very incidental exposure. The majority of these accounts that, 10 years ago, were able to buy their coverages within a standard market, are now buying it in some type of excess or surplus line, or as Mr. Eblen stated, they are large enough to be involved in a self-insurance program of one type or another.

But the small accounts are the ones that are finding difficulty with that type of coverage. It is further complicated, sir, in that these types of accounts do not need just longshoremen and harbor workers' coverage; they also need general liability, related automobile, contractual liability, and very often, and most often in our part of the country, some type of maritime or Jones Act coverage.

By having all of the workers' compensation lines placed within the available pools, there is then a restricted market as to those carriers who would otherwise be willing to write the general liability.

We often find that an account which, several years ago, we were able to place with maybe one primary underwriter for all primary coverages and an umbrella carrier—that is, with two carriers—we now find that we will have to put a package together with four or five different insurers, which leads to unproductivity and lack of coordination in that customer's insurance program.

Senator NICKLES. Thank you.

Mr. Blum, do you find the same case in primarily dealing with off-shore rigs, and so on, as far as a servicing outfit to service those wells?

Mr. BLUM. Yes, Senator. To expand on Mr. Eblen's comments, in off-shore Louisiana, for the most part, the contractors that we insure, the service contractors, are doing business with the major oil companies. It is not a question of not buying the coverage or of going bare; they have to meet the contractual obligations that the major oil companies place upon them. Consequently, they have to buy all of the coverages, including longshoremen coverage, if they want to do the work. This, since 1972, has brought about some great economic problems.

We have insured several businesses that have gone out of business partly because of the insurance costs. There were some other contributing factors, certainly, but one was the escalating insurance cost, and that is really brought about because we no longer have an open market situation.

For the most part, as has already been said, if the account is not large enough to place in some type of a self-insured program, we have no other place to go but the assigned risk plan and surplus lines. That being the case, it is not a competitive situation, pricewise, and the buyer suffers in that situation.

Senator **Nickles**. In that type of situation, here again, you are talking about, let us say, a smaller company that is trying to service those units, and what not. Are they required under that type of situation to set up reserves? Do they have to have fairly substantial reserves?

I think this was what you were referring to earlier as their possible alternative. If they do not go to an outside carrier, I guess, or if they cannot pick up an outside carrier that does not just pass through the costs on a retroactive basis.

Mr. **Blum**. Well, of course, there are several ways to do it. We write several accounts that have, basically, a $35,000 or $50,000 deductible. They, however, take that money and deposit it into an account that is admininstered by someone for them who handles their claims and their engineering services, and so forth, and insurance is bought above that level.

For larger accounts, you, of course, get into much higher deductibles, but the bottom line of it is that the consumer is still put in a position where he does not really have very many, if any, choices in buying the product that he needs in order to operate his business.

Senator **Nickles**. Mr. Snodgrass, you mentioned several things in comparing the Washington, D.C. area, which is covered by the Longshore Act, with the surrounding Virginia and Maryland areas.

I think you alluded to this; the carpentry rate in D.C.—the workers' compensation rate is $26, and in Maryland it is $8.78, and in Virginia it is $6.64. The rates are basically three or four times higher in Washington, D.C. than they are in Virginia or Maryland.

Is it more dangerous to work in Washington, D.C. than it is in the surrounding neighborhoods?

Mr. **Snodgrass**. No, it is not more dangerous.

Senator **Nickles**. Given the fact in Washington, D.C. that the Federal Government is the prime contractor for many of the buildings—the Hart Building and many of the other construction projects—just looking at the difference at this rate, the $26 versus the Maryland $8 and the Virginia $6, we are still talking about three and almost four times a higher rate, and that is per 100.

It is $20 more per 100 in D.C. versus Virginia, so the cost to build a project in Washington, D.C.—direct labor costs would be what, given the same hourly rate of pay? Would it be 20 percent higher? Am I calculating that correctly in my mind?

Mr. **Snodgrass**. Well, certainly, it would be substantially higher for almost any kind of work that is done in the District of Columbia. Even clerical office work is more expensive.

You mentioned the construction of the Hart Building. Yes, it is going to cost more to build it in Washington, D.C., than if it were in nearby Arlington, Va. or Silver Spring, Md., and all that cost is passed on to the taxpayers, ultimately.

Senator **Nickles**. Because the workmen's compensation rate is four times higher for that carpenter, I am trying to figure this out. It is four times higher—$26 versus $6, given your figures.

Mr. **Snodgrass**. Right.

Senator **Nickles**. Four and a half times, I guess, comparing that to Virginia.

Of course, you would have your different rates. You would have your concrete work and your electrical work, and so on. If we were able to come up with a figure of average compensation rates in Virginia, say, and average compensation rates in Washington, D.C. and multiply that times the total estimated payroll, we would be talking about a figure that is going to be in the millions of dollars for a lot of Federal projects.

Mr. SNODGRASS. That is correct.

Senator NICKLES. A followup question. You are in the business, I guess, of trying to find carriers to pickup compensation. You will have XYZ contractor or businessman that says, "Please help me, Mr. Snodgrass; I need some workers' compensation. I am going to bid on this project over here and I need to have a carrier."

How much trouble do you have finding a carrier for him? Are there ample people who will underwrite it?

Mr. SNODGRASS. The market fluctuates. Currently, the underwriting market as far as the independent companies are concerned, is not too anxious to write any workers' compensation in the District of Columbia. If you can persuade them as an agent that there are other lines of insurance that will be beneficial, add as collateral to an account and the overall picture looks good to a particular company, then the insurance may be willing to accept workers' compensation risk under a retrospective rating or some other protective feature.

Senator NICKLES. Are retrospective ratings commonplace in this field, also?

Mr. SNODGRASS. Yes, they are.

Senator NICKLES. Gentlemen, those are all the questions I have. Senator Williams may have some additional questions for you, and our staff may want to ask you some additional questions for the record.

We very much appreciate your assistance in this endeavor. Thank you.

[The prepared statements of the National Association of Insurance Brokers and Mr. Eblen follow:]

NATIONAL ASSOCIATION OF INSURANCE BROKERS
STATEMENT REGARDING S. 1182
JUNE 23, 1981

The National Association of Insurance Brokers (NAIB), represented today by Frank L. Eblen of Johnson & Higgins, is pleased to submit this statement in support of S. 1182, the "Longshoremen's and Harbor Workers' Compensation Act Amendments of 1981."

The NAIB represents over 125 commercial insurance brokers throughout the country. Our members provide insurance and risk management services to many businesses which are affected by the Act. NAIB member firms presently negotiate a substantial part of the USL&HW Act coverage written by insurers and also provide management services to self-insurers subject to the Act.

As commercial insurance brokers, our principal role is to represent the interests of our clients. We normally perform this role by negotiating insurance contracts, providing risk management services, or servicing captives or self-insurance plans. However, when acts of government authorities affect the interests of our clients from an insurance or risk management standpoint, it is also incumbent upon us to extend our representation of their interests into the government arena. In the case of the legislation before the subcommittee today, S. 1182, relief will be provided to those among our clients who are subject to the Act. Therefore, we appear to support enactment of the legislation.

The experience of NAIB member firms who service clients subject to the USL&HW Act confirms that the 1972 Amendments to the Act, and subsequent judicial interpretations and administrative actions by the Department of Labor, have resulted in an exposure which is virtually uninsurable in the private voluntary market. Clients subject to the Act have experienced severe insurance availability and cost problems. Many have been forced to accept coverage in assigned risk plans or have turned to self-insurance. Only remedial action by the U.S. Congress can correct the inequities created by the 1972 Amendments and restore balance to the system.

Recognizing the need for reform of the Act, the NAIB established a special task force earlier this year to make specific recommendations for comprehensive reform and to review legislation introduced in the 97th Congress to accomplish such reform. There were representatives on this task force from: Corroon & Black/Dawson & Co., Inc. in Seattle; Alexander & Alexander of Texas in Dallas; Adams & Porter in New York City; Johnson & Higgins of California in Los Angeles; and Jay & Renfro, Insurance Brokers, in Newport Beach. All of the task force representatives drew on the experience of their own offices, as well as well as those of other NAIB member firms, in dealing with coverage under the USL&HW Act. The task force recommendations were presented at the NAIB Annual Meeting earlier this month and were unanimously adopted as the position of the association.

The NAIB supports reform legislation which will restore the USL&HW Act to an insurable basis. Such legislation must contain provisions which will make the coverage of the Act more certain and the cost of losses more predictable. Specifically, the NAIB believes that the following purposes should be accomplished by reform legislation:

1. To clarify the jurisdiction of the Act, eliminating coverage for employees who are adequately covered under state workers' compensation systems. The Act was originally intended to cover employees who, by virtue of working over the navigable waters of the United States, were not covered by state workers' compensation laws. The 1972 Amend-

ments, as they have been interpreted, have distorted that original purpose by extending coverage inland and to employments never intended to be covered by the Act. Jurisdiction must be clearly defined so that there will be no confusion over when USL&HW coverage applies.

2. To place a ceiling on the annual increase in benefits. -- This feature of the 1972 Amendments is the one most responsible for the difficulty in making accurate actuarial predictions of the cost of claims under the Act. It must be corrected in order to restore a reasonable degree of predictability to the pricing of USL&HW coverage.

3. To eliminate the unrelated death benefit.--This is a life insurance provision and has no place in a workers' compensation system. Life insurance is normally negotiated by employees or their representatives as part of an employee benefits plan. It is not mandated by law, and the USL&HW Act is the only workers' compensation program to contain such a provision.

4. To make death benefits subject to the same maximum as disability benefits.--The failure to make death benefits subject to the maximum clearly was an oversight in the drafting of the 1972 Amendments. However, the Supreme Court decision in the Rasmussen case requires that the Congress correct this error.

5. To require coordination of benefits with those from other sources.--Coordination of benefits would prevent payments which exceed lost wages and would encourage return to work. Particularly with respect to disabled workers who have passed retirement age, it is inappropriate to continue paying benefits meant to compensate for wages lost during employment years.

6. To compute benefits on the basis of "spendable earnings" rather than gross salary.--This change, taken from the recommendations of the National Commission on State Workmen's Compensation Laws, would prevent benefits from exceeding take-home pay and would provide further incentive for return to work.

7. To deny benefits if rehabilitation is refused.--Rehabilitation is an integral part of a workers' compensation system and should be encouraged.

8. To eliminate the free choice of physician.--Not only has the free choice of physician been identified as a factor contributing to the processing of fraudulent claims, but it also can result in injured employees receiving inferior treatment.

9. To improve the administration of the Act.--Administrative improvements should be included in reform legislation in order to accomplish more timely settlement of claims and to make abjudication of contested claims more independent of the Department of Labor.

S. 1182 accomplishes the above-described purposes and, therefore, is endorsed by the NAIB. Enactment of this legislation would restore balance to the system and would make the USL&HW exposure more certain and predictable, and, therefore, insurable. In so doing, it would not deprive injured and disabled employees of adequate and equitable compensation.

Attached to this statement of the NAIB position supporting reform of the USL&HW Act is a statement by our representative, Frank L. Eblen, CPCU, ARM, Vice President of Johnson & Higgins. In this statement, Mr. Eblen describes the experiences of the clients of his firm who are subject to the Act. The NAIB has other documentation from member firms, supporting the need for reform of the Act, and would be pleasdd to provide this information for the record if the subcommittee wishes.

The NAIB appreciates this opportunity to furnish its views to the subcommittee. We stand ready to provide further assistance, and Mr. Eblen will be pleased to answer any questions.

Mr. Chairman and members of the Committee:

My name is Frank L. Eblen. I am a Vice-President of Johnson & Higgins, a privately held international insurance brokerage firm. For many years, our company has been heavily involved in arranging various insurance coverages, in respect to the employee injury exposures for businesses involved in "water" related activities. These exposures included Federal Acts (U.S.L&H, Jones, Etc) as well as the State Compensation obligations. Our involvement includes direct placement on a primary basis, excess of self insured retentions, umbrella coverage, reinsurance, formation and management of "captive" insurance and reinsurance companies, review and analysis of losses, including paid and reserve claims, assisting in loss control activities, and other similar functions normally associated with the larger brokerage firms.

As a member of the National Association of Insurance Brokers and one of the association members in the National Insurance Producers Conference, it is an honor and a privilege to be here as part of this panel to give support for this much needed reform legislation.

In reviewing the problems encountered by clients as a result of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, I present the following information.

The full impact of the '72 amendments was not fully realized for a number of months after the passage of the legislation. About 1975 the insurance companies began to feel the "bite" caused by changes involving, for instance, the annual benefit escalator and the unrelated and uncapped death benefits. These changes, among others, forced insurers to substantially increase their loss reserves on all outstanding injury claims. In addition, the insurance companies took a "hard" look at all their United States Longshoremen & Harbor Workers' policies. Because of the "long tail" consequences of this class of business and with other types of casualty coverage and capacity problems, they began to drastically restrict writing U.S. L&H business. Companies writing some of our clients for many years, cancelled policies and/or refused to renew the coverage. Placement of new business was virtually impossible.

As brokers, there were only a few alternative courses of action. For the larger risks, we were able to negotiate some kind of a loss responsive plan such as a retrospective rating plan, in which a firm basically pays its own losses subject to a maximum and minimum premium. These types of plans, because of the restricted market conditions, were heavily weighted in favor of the insurance underwriter.

Another alternative for the larger buyer was to qualify as a self-insurer. However, the insurance companies writing the excess coverage insisted upon high levels of SIR (Self Insured Retention) running from $50,000 in 1975 and 1976 to $250,000, $500,000 and even $1,000,000 in today's market. In addition to the high SIR, no company would provide "statutory" coverage but only a specific dollar limit. In other words, a firm self-insuring the first $250,000 for each accident could only buy coverage, say $10,000,000 excess of $250,000. This meant that the firm became a self insurer again for benefits paid above the $10,000,000 level. Additionally, the number of companies writing this type of insurance has diminished drastically.

Another problem for the self insurer was the bonding requirement by the Department of Labor. Many businesses could not meet the financial requirements of the bonding insurance company if they were able to find a surety underwriter willing to issue the necessary bond. If a surety bond could not be purchased then the business could file security in acceptable form and amount determined by the Department. In many cases, these requirements proved to be too great a financial burden on many businesses.

The third alternative for the large risk would be to start up its own company, a "captive" reinsurance company. This company, operating as a subsidiary would write as reinsurance of an authorized admitted insurer the needed coverage for its parent. In almost all cases, these wholly owned reinsurance companies would buy reinsurance above their self assumed level of retention. The reinsurance companies fully recognize the problems caused by the '72 changes and are cautious and restrictive when negotiating their contracts.

The charges for the reinsurance (as in the direct insurance placements) was sufficiently high reflecting the financial uncertainties of the '72 changes.

The medium and/or small risks only had two choices. First, they could attempt to purchase coverage, if available. However, in these few states where coverage was available, underwriters could surcharge and the cost would be exorbitant. (In California, under "open rating" regulations, companies could surcharge at almost any level, hoping to be able to eventually recover its projected losses. In states where coverage could be obtained through the assigned risk facility, many jurisdictions limit coverage to specific limits ($10,000-$100,000) versus statutory coverage as well as tacking on surcharges.

The second alternative for the smaller firms is to "go bare". Many small businesses can not afford to buy coverage, even where their exposure is limited. Some of these companies have set up corporations with limited assets in anticipation of a possible bankruptcy caused by a large claim under the U.S. L&H. Other business refused to do work where the exposure existed because the cost of coverage exceeded many times the profit potential.

Let's look at a few actual cases.

Company A., a large boat builder, had 90% of it's employees under the state compensation benefits. The employee definition change (Section 2(3)) shifting employee classifications under the Federal Act increased this company's cost approximately 300%. This particular business had long term contracts (2-3 years) not subject to any modification as a result of this kind of circumstance. In some cases, these additional costs can be passed on to the ultimate buyer. It is apparent that the land based employees (some located miles from the "water's edge") have no increased exposure compared to a manufacturer fabricator, doing similiar operations of welding, grinding, painting, materials handling, etc. Obviously, this change put a severe financial burden on the firm and almost put them out of business.

Company B, a small oil field service contractor located in the Gulf Coast area, had practically all employees under the state compensation act prior to 1972. In 1971, the rate per $100 of payroll applicable to the operations was $5.70. As a result of the jurisdictional change the rate went to $12.00. This firm's compensations base costs (without application of any experience modification) has risen substantially since 1971. As a percentage of gross revenues.

1971	.077%	1977-	3.1%
1972	1.95%	1976	3.9%
1973	2.2 %	1977	4.6%
1974	2.8 %	1978	5.7%
		1979	6.8%
		1980	7.4%

Despite this firm's decision in 1975 to change from commerical insurance to a modified self-insured plan, (the first $50,000 of each claim and their buying excess coverage), their costs still escalated. However, the funding change resulted in the control of loss reserves and the resultant use of these dollars. These costs are built into their pricing structure which are passed on to the oil companies and eventually we (the public) are all paying the high and unnesessary burden caused by the '72 Amendents.

Company C, a stevedoring company with operations in 14 port facilities on the West Coast, Gulf and East Coast experienced severe problems after the '72 enactment. In 1975, the insurance carrier of many years imposed an extremely harsh 3 year rating plan. This carrier, specializing in Compensation and Longshoremen coverages, had severe difficulties resulting from the many uncertainties and unknown features of the '72 amendments. Some of these being jurisdictional questions, high benefits creating incentives not to go back to work, annual escalation, unrelated death benefit, etc. After the two years of rising rates and resultant costs averaging 30-40% per year, Company C looked at alternatives - assigned risk plans, self-insurance and a captive insurance company. After a indepth study, the captive alternative was chosen. The principal advantage was cash flow, the retainage and use of loss reserve funds. However, the same problems as previously stated above of accurately forecasting claim amounts and setting reserves still exists. Hopefully, with continued emphasis on safety programs and claims control Company C will mitigate to some extent these continued exhorbitant costs. However, the ultimate answer is in legislative reform.

After eight years of litigation and several Supreme Court decisions, the longshoring industry has clarified, to some extent, the Act's inland reach. However, there are many businesses that are faced with this jurisdictional problem of jobs falling within the "twilight zone". One large industry segment that comes to mind is the oil and gas offshore area. Because of the energy crisis, there has been a tremendous increase in exploration and development not only in the Gulf but both, East and West coasts.

Some of these businesses are the construction of platforms (drilling and production), all types of drilling vessels (submersibles, semi-submersibles, jack-ups, bay barges, etc.) and the myriad of occupations involved with the related services.

The problem of insurance companies and self-insured employers accurrately predicting future benefit exposures has been doubly complicated by a number of recent decisions including two Supreme Court opinions. (Sun Ship, Inc. v. Commonwealth of Pennsylvania and Thomas v. Washington Gaslight Co.). Because of these decisions as wellas others from various Circuit Courts of Appeal regarding the overlap of the Act and the maritime law, there is no longer any clear delineation between and/or among the courses of action available to injured workers. The majority of employers involved in the oil/gas offshore industry owns/leases/charters/uses various types of watercraft. These activities would be loosely classified "maritime" and could be subject to liability under the following:

- State Workers Compensation
- Lonshoremen and Harbor Workers' Compensation Act
- Jones Act
- general maritime law

Thus, a prudent employer must protect against all the above exposures because all options are available to many employees. It is quite obvious that the uncertainties and excessive costs created by the present jurisdictional problems must be corrected.

From the brokers standpoint, we do not see any relief in the current marketplace relating to the availability and cost of the Longshoremen and Harbor Workers' Compensation insurance coverage. There is no question that the 1972 amendments created many more problems than they solved.

In attempting to establish an equitable exchange of increased benefits for the re-establishment of the "exclusive remedy" principle, they have instead produced jurisdictional problems, excessive costs, confusion in the courts, administrative delays, and an unnecessary additional need for legal services.

The direct and indirect consequences experienced by both employers and employees have been and continue to be a worsening problem. These additional costs are built into the price of products and services which the consumer ultimately pays - thus, society, as a whole, loses.

Senator NICKLES. Our next guest today is Congressman John Erlenborn from Illinois. He has been quite active in this field.

Welcome, Congressman; we are glad to have you with us. I think most of the people in this room are well aware of the contribution you have made, which I consider very considerable and specialized in this particular field of longshoremen's and harbor workers' compensation.

Your H.R. 25 has been, as I think most people realize, the foundation on which Senate bill 1182 is based. So, for your contributions, your past efforts, and your continued diligence in seeking some equitable solutions for working men, women, and also for employers in coming up with a solution that will benefit all people, including the consumers of this country, I compliment you and welcome you to our hearings. Thank you.

STATEMENT OF HON. JOHN ERLENBORN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. ERLENBORN. Thank you very much, Mr. Chairman. I want to thank you for this opportunity to testify on a subject which has held my interest for many years.

You are to be commended for confronting, head-on, a most controversial issue and for proposing legislation to correct the program's imbalance.

My comments this morning will be brief, focusing less on the specifics of H.R. 25, my counterpart to S. 1182, than on the general thrust of these bills and the environment in which they are now under consideration.

The Longshore Act is unquestionably the worst workers' compensation law in the Nation. Other witnesses may have drawn your attention to the opprobrium in which the act is held by the Supreme Court. The Chief Justice termed the act, ". . . about as unclear as any statute could conceivably be." And Justice Brennan, not to be outdone, referred to it as a "jurisdictional monstrosity."

What is the foundation of the Longshore Act's problems? Its deficiencies extend deeper than the provisions of the statute themselves. The statute, after all, expresses merely the intentions of a legislative body. It is the concrete representation of a legislative philosophy.

What is the concept of workers' compensation? Since its emergence in our country early in this century, workers' compensation has been conceived as a no-fault means of replacing lost wages of employees suffering from employment-related injuries. That was the purpose of the Longshore Act, when enacted in 1927. That, unfortunately, is not the purpose of the act today, and it is here, with the concept of workers' compensation, where lies the Longshore Act's fundamental fault.

With the 1972 amendments, Congress approved a workers' compensation program which reached far beyond its traditional purpose by incorporating concepts of pensions, life insurance and punitive damages, and thus perverting the Longshore Act into a new form of social welfare. This excess philosophical baggage has strained severely the ability of insurance risk assessment mechanisms to assure adequate coverage, driven up program costs astronomically, created claims filing incentives and rehabilitation and return-to-work disincentives, and, all in all, imposed significantly higher costs of doing business.

Not surprisingly, these higher costs have had an adverse effect on jobs and America's competitive edge in the maritime industry generally. Thus, Canadian and Mexican ports with far cheaper workers' compensation costs lure business and jobs from American ports, and our shipbuilding industry has not remained competitive with foreign shipbuilders.

I focus on the conceptual shortcomings of the Longshore Act because that is really what is addressed in H.R. 25 and S. 1182, and because I want to underscore that the insurability crisis in the act stems not from greedy insurance companies ripping off businesses, as organized labor would have us believe, but organized labor's broadened concept of employee social justice.

The round peg of workers' compensation cannot fit within the square hole of labor's view of workers' compensation's role. Unless Congress alters the concept of the Longshore Act by ridding the statute of inappropriate provisions, the insurability crisis will worsen. This has been my compass in drafting H.R. 25.

Both H.R. 25 and S. 1182 would return the Longshore Act to its proper moorings of replacing lost wages. Benefits for injuries, except permanent total cases, would cease at retirement age because, by definition, retired people cannot lose wages they do not earn.

Permanent total benefits would continue for life because I am concerned that a young worker who becomes truly disabled and has not earned sufficient quarters for social security or whose pension is not vested would unfairly lose financial support at what would be normal retirement age.

However, for those permanent total cases not in this extreme category, the bill imposes a benefit offset so that a retired worker does not reap a windfall through pyramided benefits.

The bills would repeal the unrelated death benefit provisions, because life insurance should not be part of workers' compensation. They also cap death benefits at the same level as disability benefits, reestablishing the link between a survivor's benefits and employment.

Gone as well are punitive damages features, which have permitted awarding of permanent and temporary partial disabilities without any loss of wages. The bills accomplish this by redefining wage earning capacity so that benefits are paid only for wages actually lost.

Another punitive damages-type provision is the uncapped annual escalator, in that it overlays an already rich benefit structure and, in itself, probably contributes more to the act's uninsurability than any other feature.

H.R. 25 and S. 1182 cap the escalator at 3 percent. Frankly, I believe some escalation is appropriate in today's inflationary economy. Yet, the cap, to be meaningful and not to perpetuate the insurability problem, must be considerably lower than current inflation.

Incidentally, I believe this is one major reason organized labor opposes any realistic cap on escalation. Opening up the act might be akin to opening a Pandora's box. It is simply more comfortable preserving the status quo of a rich benefits program than to worry about dealing with employers' objections in a legislative context. Organized labor would be required to burn up precious political capital that way.

I do not fault labor's objective, but this philosophy is no way to design an efficient and fair workers' compensation system—our objective as legislators.

The other major element of both bills is contracting jurisdiction. The Longshore Act was meant to cover maritime workers who could not constitutionally be covered by a State's workers' compensation law. The 1972 amendments, as you know, strayed significantly from this purpose. The legislation would go a long way toward reflecting the original purpose.

Against this backdrop, H.R. 25 and S. 1182 should be viewed as merely correcting an imbalance in the program stemming from the 1972 amendments. They most emphatically are not a "gutting of the act" or "vicious," as organized labor has so demogogically charged. The shrillness of their voice is meant to cover the weakness of their case. Their reaction reminds me of the mine workers who threatened an illegal strike when the President proposed limiting black lung benefits to those with medical proof of disability due to pneumoconiosis. To believe labor's charges, the President was about to take away benefits from miners disabled by black lung and their widows when this simply was not true.

One yardstick against which to measure a workers' compensation program is the recommendations of the 1972 National Commission on State Workmen's Compensation Laws. Personally, I believe the Commission's work, though now somewhat dated, to be a useful contribution to a debate on workers' compensation, although to focus solely on its recommendations as commandments engraved in stone, handed down by that higher authority, is to be narrow-minded. Still, this is how organized labor views the Commission's recommendations.

So, how do H.R. 25 and S. 1182 stack up? Pretty well. First, the maximum weekly benefits rate remains 200 percent of the national average weekly wage, in conformity with the recommendations of the National Commission.

Second, there remain no dollar limits on disability, medical, or death benefits, and no limit on duration of medical benefits.

Third, the minimum disability benefit rate is changed from 66⅔ percent of gross wages to 80 percent of spendable income.

Fourth, the bills continue to pay full benefits during periods of rehabilitation.

Fifth, they require estimates of permanent partial impairments to be in accord with the American Medical Association's "Guides to the Evaluation of Impairment," assuring that similarly impaired workers are treated equally.

Sixth, claims processing is expedited in the interest of both employer and employee.

Seventh, a conservator for the special fund is established to prevent unjustified claims on the fund's resources.

Eighth, the bills retain the assessment of employee attorney fees against the employer, although in more limited circumstances.

Nine, they adopt a strict definition of permanent total disability so that, to be judged a permanent total case, a worker must be precluded from earning any wages.

Tenth, they do not reduce by 1 cent the benefits of anyone now receiving them.

Incidentally, if labor is so concerned for this legislation's conformity with the Commission's recommendations, it should be pleased to learn that the bills delete provisions of the current act not in conformity. I referred to them earlier—uncapped annual indexation of benefits; no cap on maximum death benefits; and unrelated death benefits.

Finally, permit me one admonition for employers supporting these bills. These products were not drawn up overnight, as were the 1972 amendments in a midnight meeting by Senate Labor Committee staff. They reflect compromises and painstaking review. They still need refinement, but their thrust should remain the same.

Any attempt by employers to radically change this legislation is not supportable. I include in this category any attempt to bail out the special fund with a Federal appropriation. Our ongoing, unpleasant experience with another political fund—the black lung disability trust fund—should be fair warning to all of the difficulties of controlling costs once we embark on the slippery slope of congressional appropriation or entitlement. I would consider such an attempt not consistent with the President's economic program, and I am one Member who is supporting that program.

Thank you, Mr. Chairman.

Senator **Nickles**. Thank you, Congressman. We appreciate your efforts, diligence, and expertise in this area. There are a couple of questions I would like to ask you.

You mentioned that if Senate bill 1182 or H.R. 25 is enacted, not one person would have his benefits reduced by 1 cent. Is that correct?

Mr. ERLENBORN. That is correct, Senator. The effect of the act would be prospective only, not retrospective.

Senator NICKLES. Are we changing the benefit cap, for some of the maximum weekly benefits at 200 percent of the national average weekly wage? That remains intact as it is today?

Mr. ERLENBORN. That is right.

Senator NICKLES. We are not changing that basic cap.

You are probably familiar with the State of Illinois' workers' compensation and those of other States. Does any other State have a program that pays 200 percent of the national average weekly wage?

Mr. ERLENBORN. I am advised that probably the only State that might have benefits that high would be Alaska. Otherwise, I do not believe any of them do.

And your reference to the State of Illinois workers' compensation would lead me to make the observation that when I was in the Illinois Legislature back in the sixties, I participated in the agreed bill process, which was a procedure that had been used for many years where representatives of organized labor, management, and the legislature would meet, discuss, compromise, and finally come up with an agreed bill that could pass the legislature and be signed.

That process broke down in the late seventies, and organized labor got exactly what they wanted in the bill that went through the legislature because of political imbalance in the governship and the State legislature. The cost of workers' compensation in Illinois skyrocketted to the point where we were losing industries in the State of Illinois to other States because of the cost of that one item alone, similar to what has happened to the District of Columbia with the private work force being covered by the Longshore Act.

I am certain, Senator, that you are aware of the attempt by the District of Columbia Council to escape the Longshore Act by passing their own workers' compensation law. It has been thwarted so far with lawsuits by organized labor, but it is a story very similar to what happened in the State of Illinois.

Senator NICKLES. I appreciate that very much.

There will be witnesses following you shortly that will be very critical, I guess, of the change from the two-thirds of the gross wage to the 80 percent of net take home. Do you have any comments to reassure that?

I notice by your comments that the 80 percent of spendable income was supported by the National Commission on Workers' Compensation. Are you aware of that being successful? Is the theory behind this that a person should not be making more under disability than they were while working?

Some individuals have testified that in no case is that happening today. Other individuals have testified that there are a lot of people making more money under disability than they did while working.

Mr. ERLENBORN. Senator, again, the experience of the District of Columbia private work force is probably instructive in this regard.

The Metro management has in their employ some 6,000 employees operating buses, subways, and so forth. They are covered by the Longshoremen's Act, with the present limit of two-thirds of gross income.

The average caseload in the District in the past few years has been 3,000 disability claims from the 6,000 man and woman work force. The incentives to file claims and the disincentives for rehabilitation and return to work were such that the Metro management proposed seriously that any worker who withheld filing a workers' compensation claim for 3 months would have his or her name put in the hat for a drawing for a color television set. Anyone who held off for a whole 6 months would have their name put in the hat for a drawing for a new automobile.

I think that tells you something about the construction of this act and the limit of two-thirds of gross wages. When you deduct the cost of insurance, if they are paying that, taxes, and work-related expenses, two-thirds of gross wages is more spendable income than they had when they were working, and it encourages the filing of claims and discourages the return to work.

Senator NICKLES. Congressman, I have no other questions. We do continue to seek your advice and counsel, and hopefully to work with you. If we can have a few meetings with labor and industry groups, we would like to certainly have you participate in the formulation of the changes. We certainly solicit your input on any additional changes that you feel should be made on this also.

Mr. ERLENBORN. Thank you very much.

Senator NICKLES. Thank you.

[The prepared statement of Representative Erlenborn follows:]

STATEMENT BY
U.S. REP. JOHN N. ERLENBORN
OF ILLINOIS

BEFORE THE
SUBCOMMITTEE ON LABOR
OF THE
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Tuesday, June 23, 1981

Mr. Chairman and members of the Subcommittee, I want to thank you for this opportunity to testify on a subject which has held my intense interest for several years -- the Longshoremen's and Harbor Workers' Compensation Act.

My vantage is as senior Republican on the House Labor Standards Subcommittee which has jurisdiction over the Longshore Act and those other two paragons of Congressional malfeasance, the Black Lung and Federal Employees' Compensation Act.

You are to be commended for confronting head-on a most controversial issue and for proposing legislation to correct the program's imbalance. After four years of oversight hearings before two House Subcommittees and the Senate Labor and Human Resources Committee, comprising thousands of pages of testimony, everyone concerned should have at least a general understanding of the Act's shortcomings. Clearly it is high time Congress act.

-MORE-

My comments this morning will be brief, focusing less on the specifics of H.R. 25, my counterpart to S. 1182, than on the general thrust of these bills and the environment in which they are now under consideration.

The Longshore Act is unquestionably the worst workers' compensation law in the nation. Other witnesses may have drawn your attention to the opprobrium in which the Act is held by the Supreme Court. The Chief Justice termed the Act ". . . about as unclear as any statute could conceivably be . . .," and Justice Brennan, not to be outdone, referred to it as a "jurisdictional monstrosity." I wait with anticipation for the characterization to be found in the next Supreme Court opinion. Somehow, I don't believe I'll have long to wait.

What is the foundation of the Longshore Act's problems? Its deficiencies extend deeper than the provisions of the statute, themselves. A statute, after all, expresses merely the intentions of a legislative body. It is the concrete representation of a legislative philosophy. So, behind every statute -- somewhere -- is a legislature's conceptual understanding of the legislation's purpose.

What is the concept of workers' compensation? Since its emergence in our country early in this century, workers' compensation has been conceived as a no-fault means of replacing lost wages of employees suffering employment-related injuries. That _was_ the purpose of the Longshore Act when enacted in 1927. That, unfortunately, is _not_ the purpose of the Act today; and it is here, with the concept of workers' compensation, where lies the Longshore Act's fundamental fault.

-MORE-

With the 1972 Amendments, Congress approved a workers' compensation program which reached far beyond its traditional purpose, by incorporating concepts of pensions, life insurance, and punitive damages, and thus perverting the Longshore Act into a new form of social welfare. This excess philosophical baggage has strained severely the ability of insurance risk-assessment mechanisms to assure adequate coverage, driven up program costs astronomically, created claims filing incentives and rehabilitation and return-to-work disincentives and, all in all, imposed significantly higher costs of doing business. Not surprisingly, these higher costs have had an adverse effect on jobs and America's competitive edge in the maritime industry generally. Thus, Canadian and Mexican ports, with far cheaper workers' compensation costs, lure business and jobs from American ports; and our shipbuilding industry has not remained competitive with foreign shipbuilders.

I focus on the conceptual shortcomings of the Longshore Act because that is really what is addressed in H.R. 25 and S. 1182, and because I want to underscore that the insurability crisis in the Act stems not from greedy insurance companies ripping off businesses, as organized labor would have us believe, but organized labor's broadened concept of employee social justice. The round peg of workers' compensation cannot fit within the square hole of labor's view of workers' compensation's role. Unless Congress alters the concept of the

-MORE-

Longshore Act by ridding the statute of inappropriate provisions, the insurability crisis will worsen. This has been my compass in drafting H.R. 25.

Both H.R. 25 and S. 1182 would return the Longshore Act to its proper moorings of replacing lost wages. Benefits for injuries, except permanent total cases, would cease at retirement age because, by definition, retired people cannot lose wages they don't earn. Permanent total benefits would continue for life, because I am concerned that a young worker who becomes truly disabled and has not earned sufficient quarters for Social Security or whose pension is not vested would unfairly lose financial support at what would be normal retirement age. However, for those permanent total cases not in this extreme category, the bill imposes a benefit offset, so that a retired worker does not reap a windfall through pyramided benefits.

The bills would repeal the unrelated death benefits provision, because life insurance should not be part of workers' compensation. They also cap death benefits at the same level as disability benefits, re-establishing the link between a survivor's benefits and employment. Gone as well are punitive damages features which have permitted awarding of permanent and temporary partial disabilities without any loss of wages. The bills accomplish this by re-defining wage-earning capacity so that benefits are paid only for wages actually lost.

-MORE-

Another punitive damages-type of provision is the uncapped annual escalator, in that it overlays an already rich benefits structure and, in itself, probably contributes more to the Act's uninsurability than any other feature. H.R. 25 caps the escalator at 3 per cent. S. 1182 provides no escalation. Frankly, I believe some escalation is appropriate in today's inflationary economy. Yet, the cap, to be meaningful, and not to perpetuate the insurability problem, must be considerably lower than current inflation. This differential also serves one other beneficial purpose from a legislative perspective: If benefits prove to be inadequate over time, there will be political pressures on Congress to address itself to the perceived shortcomings, and that pressure will permit Congress to re-examine the Act on a more regular basis. The cap is, in a sense, a sunset provision.

Incidentally, I believe this is one major reason organized labor opposes any realistic cap on escalation. Opening up the Act might be akin to opening up Pandora's Box. It is simply more comfortable preserving the status quo of a rich benefits program than to worry about dealing with employers' objections in a legislative context. Organized labor would be required to burn up precious political capital that way.

I do not fault labor's objective, but this philosophy is no way to design an efficient and fair workers' compensation system -- our objective, as legislators.

-MORE-

The other major element of both bills is contracting jurisdiction. The Longshore Act was meant to cover maritime workers who could not constitutionally be covered by a State's workers' compensation law. The 1972 Amendments, as you know, strayed significantly from this purpose. The legislation would go a long way toward reflecting this original purpose.

Against this backdrop, H.R. 25 and S. 1882 should be viewed as merely correcting an imbalance in the program stemming from the 1972 Amendments. They most emphatically are not a "gutting of the Act" or "vicious" as organized labor has so demogogically charged. The shrillness of their voice is meant to cover the weakness of their case. Their reaction reminds me of the mine workers who threatened an illegal strike when the President proposed limiting black lung benefits to those with medical proof of disability due to pneumoconiosis. To believe labor's charges, the President was about to take away benefits from miners disabled by Black Lung and their widows when this was simply not true.

One yardstick against which to measure a workers' compensation program is the recommendations of the 1972 National Commission on State Workmen's Compensation Laws. Personally, I believe the Commission's work, though now somewhat

-MORE-

dated, to be a useful contribution to a debate on workers' compensation, although to focus solely on its recommendations as commandments engraved in stone, handed down by that higher authority, is to be narrow-minded. Still, this is how organized labor views the Commission's recommendations, so how do H.R 25 and S. 1182 stack up? Pretty well.

(1) The maximum weekly benefits rate remains 200 per cent of the national average weekly wage, in conformity with the recommendations of the National Commission. In fact, the National Commission recommended a gradual increase to 200 per cent by 1981 -- this year. The Longshore Act has had this maximum since the 1972 Amendments. No other State, except Alaska, has a maximum so high.

(2) There remain no dollar limits on disability, medical, or death benefits and no limit on duration of medical benefits, in conformity with the National Commission's recommendations.

(3) The minimum disability benefit rate is changed from 66-2/3 per cent of gross wages to 80 per cent of spendable income, in conformity with the National Commission's preferred recommendation.

(4) The bills continue to pay full benefits during periods of rehabilitation.

(5) They require estimates of permanent partial impairments to be in accord with the American Medical Association's Guides to the Evaluation of Impairment, assuring that similarly impaired workers are treated equally. The National Commission

-MORE-

recognized that State industrial commissioners lacked adequate criteria for evaluating impairments and cited the AMA Guides, specifically, as a useful basis for State commissioners. I understand some States are now adopting the Guides. I also understand the Longshore program contains no unified impairment criteria.

(6) Claims processing is expedited in the interest of both employer and employee.

(7) A Conservator for the Special Fund is established to prevent unjustified claims on the Fund's resources, which would endanger the future payment of benefits from the Fund.

(8) The bills retain the assessment of employee attorney fees against the employer although in more limited circumstances.

(9) They adopt a strict definition of permanent total disability so that, to be judged a permanent total case, a worker must be precluded from earning any wages. This definition comports with Social Security Disability and Internal Revenue Service definitions and, again, is consistent with a recommendation of the National Commission, and most importantly --

(10) They do not reduce by one cent the benefits of anyone now receiving them.

Incidentally, if labor is so concerned for this legislation's conformity with the Commission's recommendations, it should be pleased to learn that the bills delete provisions of the current Act not in conformity. I referred to them earlier: uncapped annual indexation of benefits, no cap on maximum death benefits, and unrelated death benefits.

-MORE-

Finally, permit me one admonition for employers supporting these bills. These products were not drawn up overnight, as were the 1972 Amendments, in a Midnight Meeting by Senate Labor Committee staff. They reflect compromises and painstaking review. They still need refinement, but their thrust should remain the same. An attempt by employers to radically change this legislation is not supportable. I include in this category any attempt to bail out the Special Fund with a Federal appropriation. Our on-going unpleasant experience with another political Fund -- the Black Lung Disability Trust Fund -- should be fair warning to all of the difficulties of controlling costs once we embark on the slippery slope of Congressional appropriation or entitlement. I would consider such an attempt not consistent with the President's economic program; and I am one Member who is supporting that program.

Thank you, Mr. Chairman.

Senator NICKLES. On our second panel today we have Jay Power, who is legislative representative for the American Federation of Labor. We also have Frances Zwenig, who is legislative representative for the Buildings and Trades Department; and also Ande Abbott, who is the representative of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers. They are all from Washington, D.C.

Frances, I know who you are, and you are——

Ms. ZWENIG. Mr. Chairman, with me is Don Elisburg, former Assistant Secretary of Labor for Employment Standards.

Senator NICKLES. Don Elisburg?

Ms. ZWENIG. Elisburg, representing Building Trades as well.

Senator NICKLES. Thank you. You are much more attractive than Mr. Georgine; do not tell him I said that.

Ms. ZWENIG. I think he might be insulted.

Senator NICKLES. Mr. Power?

Mr. POWER. Yes, Mr. Chairman.

Senator NICKLES. Nice to see you again.

Mr. POWER. Nice to see you, sir. I am accompanied today by Mr. Larry Smedley of our social security department at AFL-CIO.

Senator NICKLES. Larry?

Mr. SMEDLEY. I am Mr. Larry Smedley.

Senator NICKLES. And Ande Abbott?

Mr. ABBOTT. Yes.

Senator NICKLES. Jay, would you like to lead off?

STATEMENT OF JAY POWER, LEGISLATIVE REPRESENTATIVE, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, ACCOMPANIED BY LARRY SMEDLEY, SOCIAL SECURITY DEPARTMENT, AFL-CIO; FRANCES ZWENIG, LEGISLATIVE REPRESENTATIVE, BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, ACCOMPANIED BY DONALD ELISBURG, FORMER ASSISTANT SECRETARY OF LABOR FOR EMPLOYMENT STANDARDS; AND ANDE ABBOTT, INTERNATIONAL REPRESENTATIVE, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, A PANEL

Mr. POWER. Thank you, Mr. Chairman.

With the knowledge that our statement will be printed in full, as you said earlier——

Senator NICKLES. It will be.

Mr. POWER. In order to expedite your 5-minute rule, I will just hit the highlights of my statement and we can move on to any questions you might have.

Senator NICKLES. OK.

Mr. POWER. Mr. Chairman, the AFL-CIO appreciates this opportunity to present our views on the Longshoremen's and Harbor Workers' Compensation Act. We propose to comment on the adequacy of the act and also on certain proposed amendments.

In 1972, Congress amended the Longshoremen's and Harbor Workers' Compensation Act to enhance workers' compensation protection for covered workers. Since the act was amended, it has been one of the best workers' compensation programs in the country. Its benefit standards meet or exceed most of the 19 essential recommendations made by the National Commission on State Workmen's Compensation Laws in 1972.

It is important to note that these improvements in the law were supported by organized labor, employees, insurance carriers, and the Nixon administration.

While benefits paid prior to 1972 were very inadequate, shipowners and stevedores were experiencing alarming increases in liability insurance costs due to application of the unseaworthiness doctrine which allowed third-party suits. In exchange for major improvements in benefits, the unions involved did not oppose amendments that provided employer relief from these suits.

Compromises on benefit standards were accepted by interested parties in Congress, in the shipping, stevedoring and shipbuilding industries, and in labor organizations. Employers and the insurance industry no longer bear the burden of the enormous costs and legal fees that existed before the act was amended. Now, they seek to back out of their part of the agreement.

The provisions in S. 1182 would cut back on what the AFL-CIO and others feel to be adequate and equitable benefits. For example, by imposing arbitrary definitions of what constitutes covered employment in longshoremen operations, many thousands of workers would be removed from coverage and placed under deficient State statutes.

While restricting coverage, benefit levels would be slashed for those individuals who would be eligible for compensation under the act. A 3-percent cap would be placed on annual increases in permanent total disability and death benefits. A 3-percent cap on annual increases does not recognize current reality and is a most inequitable protection against inflation.

An injured employee's current right to choose freely his or her physician would be eliminated. Impartial medical examinations would no longer be assured. Eliminating an employee's free choice of physician is a return to unacceptable pre-1972 practices which unduly favor the interests of the employer.

In cases of permanent total disability, compensation would be reduced by benefit amounts received from a number of other programs to the extent combined benefits exceed 80 percent of spendable earnings. There is nothing inherently wrong in allowing a worker to receive more than one benefit if he or she has incurred a risk covered by more than one program.

Determinations of compensation for occupational disease would be based on State workers' compensation laws. Such a provision is onerous and unworkable. It is absurd to rely on provisions of State laws for the definition of occupational disease benefits when these laws are so inadequate. This provision is regressive and represents a giant step backward in the evolution of workmen's compensation protections. There should be no such distinction between occupational disease and work-related injuries under the act, and the AFL-CIO is strongly opposed to the inclusion of such a requirement.

The unrelated death benefit would be eliminated. Such a provision severely penalizes survivors who need income protection once job-related life insurance benefits are lost to an injured worker and health insurance benefits are lost to their families.

All presumptions for enforcement of a claim for compensation under the act would be repealed. These presumptions—the core of any decent workers' compensation act—serve to protect the rights of both employers and employees. The AFL-CIO strongly opposes their removal.

The Benefits Review Board would be given autonomous status, with its members appointed by the President. No benefit for injured workers is derived from such a change. The Labor Department is responsible for overseeing labor and employment conditions, and thus should retain jurisdiction over the Board.

These are but a few examples of the punitive cutbacks in the protections of the Longshoremen's and Harbor Workers' Compensation Act. The AFL-CIO strongly opposes these amendments and urges that they be rejected.

A major motivation for these amendments appears to be complaints about the cost of benefits under the act. Increased program costs reflect inflation as much or the effect of changes in the act. If employer complaints that insurance rates are too high are justified, the problem is with the insurance industry.

Workers who are legitimately entitled to protections under the act should not bear the burden of these cutbacks. It should be noted that high insurance costs also reflect the high accident rate in the maritime industry. The industry should adopt safety measures to reduce the rate of serious injuries and death. Yet, S. 1182 would repeal section 481 of the act, which are the safety provisions of the act.

In view of its high accident rate, the provision of safe working conditions in this industry deserves special attention.

In conclusion, we wish to reiterate our strong opposition to these proposed amendments. The Longshoremen's and Harbor Workers' Compensation Act, since amended in 1972, is an equitable workers' compensation statute and its provisions should be maintained to insure that covered workers are protected adequately in the event of serious injury.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Power follows:]

STATEMENT OF JAY POWER, LEGISLATIVE REPRESENTATIVE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS BEFORE THE SUBCOMMITTEE ON LABOR OF THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES ON THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

June 23, 1981

Mr. Chairman, the AFL-CIO appreciates this opportunity to present our views on the Longshoremen's and Harbor Workers' Compensation Act. We propose to comment on the adequacy of the Act and also on certain proposed amendments.

In 1972, Congress amended the Longshoremen's and Harbor Workers' Compensation Act to enhance workers' compensation protection for covered workers. Since the Act was amended, it has been one of the best workers' compensation programs in the country. Its benefit standards meet or exceed most of the nineteen essential recommendations made by the National Commission on State Workmen's Compensation Laws in 1972.

It is important to note that these improvements in the law were supported by organized labor, employees, insurance carriers and the Nixon Administration.

While benefits paid prior to 1972 were very inadequate, shipowners and stevedores were experiencing alarming increases in liability insurance costs due to application of the "unseaworthiness" doctrine which allowed third-party suits. In exchange for major improvements in benefits, the unions involved did not oppose the amendments that provided employer relief from these suits. Compromises on benefit standards were accepted by interested parties in

Congress, in the shipping, stevedoring and shipbuilding industries and in labor organizations. Employers and the insurance industry no longer bear the burden of the enormous costs and legal fees that existed before the Act was amended. Now, they seek to back out of their part of the agreement.

The benefit standards included in this Act, together with the recommendations of the National Commission, should be extended to all workers. Instead, the provisions in S.1182 would cut back on what the AFL-CIO and others feel to be adequate and equitable benefit standards. For example,

- By imposing arbitrary definitions of what constitutes covered employment in longshoring operations, many thousands of workers would be removed from coverage and placed under deficient state statutes. All shoreside activities involving shipbuilding, ship repair and ship breaking would be excluded. By reinstating the "point of rest" concept, based on a harshly restrictive definition of the worksite, coverage under the Act would be reduced to the pre-1972 level.
- While restricting coverage, benefit levels would be slashed for those individuals who would be eligible for compensation under the Act. Benefits for disability or death would be reduced to an amount equal to the lesser of 80 percent of the employee's spendable earnings or 200 percent of the national average weekly wage. This provision would result in cutbacks in benefits for most individuals covered.

The National Commission on State Workmen's Compensation Laws in 1972 recommended a different 80 percent of spendable earnings formula and it is important to note the context in which this recommendation was devised. In recognition of the fact that an individual's total compensation includes fringe benefits as well as gross earnings, the National Commission determined that a benefit established at 66 2/3 percent of gross weekly wages was too low. The Commission's proposed 80 percent formula resulted in higher benefits to the worker than the customary 66 2/3 percent. In addition, their definition of "spendable earnings" reflected deductions only for federal income and social security taxes. S.1182 would also require a deduction for state income taxes. The 80 percent formula as framed by the National Commission differs in its objective from that being proposed. To use this formula in setting maximum compensation severely penalizes those workers and their survivors who are covered under the Act.

- A 3 percent cap would be placed on annual increases in permanent total disability and death benefits. Present law provides for an annual adjustment to benefits based on the percentage increase in the national average weekly wage. During the period 1972 to 1980, the national average weekly wage rose nearly 72 percent while the Consumer Price Index during this period rose 97 percent. Even under present law weekly benefits have not kept pace with the cost of living. A 3 percent cap on annual increases does not recognize current reality and is a most inequitable protection against inflation.

- An injured employee's current right to choose freely his or her physician would be eliminated. Employers would be required to submit the names of recommended physicians to the deputy commissioner for designation as authorized attending physicians under the Act. In addition, this provision requires the employer to select the physician for an employee whose injury requires immediate treatment. Impartial medical examinations would no longer be assured.

This is in opposition to the recommendation of the National Commission that workers be permitted the initial selection of their physician. Eliminating a worker's free choice of physician is a return to unacceptable pre-1972 practices which unduly favor the interests of the employer.

In cases of permanent total disability, compensation would be reduced by benefit amounts received from a number of other programs to the extent combined benefits exceed 80 percent of spendable earnings. There is nothing inherently wrong in allowing a worker to receive more than one benefit if he or she incurred a risk covered by more than one program. Such programs have different objectives and too much uniformity between programs would make achievement of these diverse objectives impossible. It is much better to risk a few cases of excessive payments than to adopt a policy that may result in injustices and/or in inadequate payments in a much larger number of cases.

With the exception of the social security and federal disability programs, adjustments for increases in living costs in other disability programs are virtually non-existent. Workers' benefits from these other programs are quickly eroded by increased living costs. If coordination of benefits were to take place, it should be based on replacement ratios of lost real wage income over a working life and not at the time of disablement. The bill's inadequate 3 percent adjustment in benefits would insure that these benefits would lag badly behind prices and even more so behind wages. The result would be an extremely small replacement of wage income lost over a working life due to the injury.

- Although the presumption that the loss of any two limbs or both eyes constitutes permanent total disability, awards in all other cases would be limited to cases in which the injured worker is permanently unable to earn any wages. Currently, these cases are determined in accordance with the facts in each situation. This provision is punitive in that permanently disabled workers who may be able to earn only extremely small wages would be ineligible for permanent disability compensation under the Act. Therefore, these workers would be forced to exist permanently on meager incomes which are far less than what they were receiving prior to the disabling injury and consequently, to bear the economic burden for their work injuries.

Determinations of compensation for occupational disease would be based on state workers' compensation laws. Such a provision is onerous and unworkable. Is is absurd to rely on provisions of state laws for the determination of occupational disease benefits when these laws are so inadequate. This provision is regressive and represents a giant step backward in the evolution of workers' compensation protections. There should be no such distinction between occupational disease and work related injuries under the Act, and the AFL-CIO is stronqly opposed to the inclusion of such a requirement.

The unrelated death benefit would be eliminated. Such a provision severely penalizes survivors who need income protection once job related life insurance benefits are lost to an injured worker and health insurance benefits are lost to their families. Even for those cases in which death is caused by the injury, the maximum weekly death benefit payable to survivors is limited to the amount available in total disability cases. In cases of temporary total disability or unscheduled permanent partial disability, compensation would cease at retirement age. This is another offset and presumes that a disabled worker who reaches retirement age would be eligible for pension and/or social security benefits which often may not be the case.

- In cases of unscheduled permanent partial disability, an employer would be able to reduce compensation if disabled workers' wages or wage earning capacity increase or suspend compensation if their wages are greater than or equal to their pre-injury average weekly wage. Since wages necessarily increase because of inflation, workers suffering this type of disability would automatically lose part or all of their compensation for injury. In addition, a limitation would be placed on the total compensation allowed in these cases. Present law allows compensation to continue throughout the duration of such disability. These provisions coupled with the proposed 3 percent cap on benefits eliminates the protections that these workers have against wage loss in the long term.

- All presumptions for enforcement of a claim for compensation under the Act would be repealed. These presumptions, the core of any decent workers' compensation act, serve to protect the rights of both employers and employees. The AFL-CIO strongly opposes their removal.

Section 8(c)(13) would be amended to specify the terms and conditions under which compensation for hearing loss will be allowed. Compensation for loss of hearing caused by industrial noise would be limited to the frequencies of 500, 1000, and 2000 cycles per second with low fence of 25 decibels and a high fence of 92 decibels. Loss of hearing above 2000 cycles per second would not constitute hearing disability. This is the same formula adopted by the American Academy of Opthalmology and Otolaryngology (AAOO) in 1959. Since that time, extensive studies and emperical research into noise indured hearing loss have shown the importance of frequencies and 2000 cycles per second. Hearing loss in the higher frequencies affects the ability to understand and discriminate speech under everyday listening conditions. It is important to note that in recognition of this evidence, even the AAOO revised its formula in 1979 to include 3000 cycles per second. In addition to proposing the most restrictive formula, workers suffering occupational deafness would be barred from filing a claim until two months after termination of exposure to harmful noise. Since this provision precludes the use of hearing protectors as a means to terminate such exposure, affected workers would be forced to quit their jobs in order to qualify for benefits. Such provisions penalize rather than protect workers. Noise induced hearing loss is irreversible and cannot be corrected, and hearing aids are of little or no use in these cases. The AFL-CIO strongly opposes these and any other restrictions which fail to recognize the severe handicap caused by exposure to harmful noise.

Present law provides for payment of additional compensation for injured employees undergoing vocational rehabilitation. S.1182 would allow continued payment of temporary total or partial compensation during rehabilitation but would eliminate the payment of additional compensation. Injured employees who refuse to undergo rehabilitation would have their benefits suspended during the period of refusal. This is not subject to reconsideration or appeal for good cause. This approach to providing vocational rehabilitation for those workers who could benefit from these services is punitive. Workers should be given positive incentives to encourage their utilization of vocational services. The National Commission recommended that additional special benefits be provided during the period of a worker's rehabilitation. Workers may have additional expenses associated with their rehabilitation instructions.

The Benefits Review Board would be given autonomous status with its members appointed by the President. No benefit for injured workers is derived from such a change. The Labor Department is responsible for overseeing labor and employment conditions and thus, should retain jurisdiction over the Board.

There are other administrative provisions that are detrimental to injured workers. For example,

- Lump sum settlements that are less than adequate would be allowed.
- Disputed benefit payments would be stayed, in many cases, pending final decision by the Board.
- Employers would again have the option of appealing directly to the courts, thereby delaying benefit payments to injured workers.

These proposed administrative changes are detrimental to workers cover by the Act, and the AFL-CIO is strongly opposed to them.

These are but a few examples of the punitive cutbacks in the protections of the Longshoremen's and Harbor Workers' Compensation Act. The AFL-CIO strongly opposes these amendments and urges that they be rejected.

A major motivation for these amendments appears to be complaints about the cost of benefits under the Act. The increased program costs reflect inflation as much or the effect of changes in the Act. If employer complaints that insurance rates are too high are justified, the problem is with the insurance industry. Workers who are legitimately entitled to protections under the Act should not bear the burden of these cutbacks. It should be noted that high insurance costs also reflect the high accident rate in the maritime industry. The industry should adopt safety measures to reduce the rate of serious injuries and death. Yet, S.1182 would repeal Section 41 of the Act which are the safety provisions of the Act. In view of its high accident rate, the provision of safe working conditions in this industry deserves special attention. It is unconscionable to cut back on benefits while reducing the responsibility of employers to provide safe working conditions. The worker is penalized in both instances while insurance costs will continue to soar.

In conclusion, we wish to reiterate our strong opposition to these proposed amendments. The Longshoremen's and Harbor Workers' Compensation Act, since amended in 1972, is an equitable workers' compensation statute and its provisions should be maintained to insure that covered workers are protected adequately in the event of serious injury.

Senator NICKLES. Thank you, Mr. Power.

Frances, do you want to go next?

Ms. ZWENIG. Mr. Chairman, my name is Frances Zwenig, and I thank you for the opportunity to testify here today. I am appearing on behalf of Robert A. Georgine, president of the Building and Construction Trades Department.

I am here to testify in opposition to Senate bill 1182 on behalf of the more than 4 million members of the Building and Construction Trades Department of the AFL-CIO.

Our members receive the protections of the Longshoremen's Act either directly or through various extensions of the act's coverage. More than 14,000 are construction workers in the District of Columbia. Many thousands more are employed by numerous shipbuilding and ship repair facilities. Our members also work on projects overseas and are included within the scope of the Longshoremen's Act through the Defense Base Act. Also, others are protected by the Outer Continental Shelf extension.

We feel that not enough attention has been paid to the problems engendered by the act prior to the amendments of 1972. For over 12 years, benefits were frozen, and consequently there was a total failure to afford adequate compensation to injured workers. There was also a complete omission in providing adequate rehabilitation services to employees. The administrative process produced grief in both employers and employees.

The 1972 amendments were a direct result of these concerns. The employers were also distressed by the staggering cost of litigation sponsored by employees. The amendments implemented many recommendations of the National Commission on State Workers' Compensation Laws which had been appointed by President Nixon in 1970 and submitted its report to Congress in early 1972.

I would like now to turn to the matter of the bill before us, Senate bill 1182, and I will highlight portions of the testimony.

Senator **Nickles**. Thank you.

Ms. **Zwenig**. The Building and Construction Trades Department is just as interested as anyone else in the prompt, effective and fair administration of workers' compensation statutes. However, a fair reading of the entire bill suggests it is more in harmony with the workers' compensation defense bar and those who wish to save money at the injured workers' expense.

There is a need for careful monitoring of its administration and the importance of insuring adequate resources for fulfilling the responsibilities of such a complex program as this. However, failure to provide adequately for administration of this statute, as has been so in the past, in no way justifies the inclusion of the regressive provisions contained in this proposal.

There are a number of provisions which I would like to address, but perhaps none is more important or indicative of the thrust of this bill than the proposal contained in section 12, which eliminates the section 20 presumptions of the act regarding claims filed under the law.

Workers' compensation statutes are enacted for benefit of the injured employees. The removal of the presumptions contained in section 20 and the adoption of other amendments in S. 1182 will undermine the real purpose of the Longshoremen's Act, and the advantages would be derived solely by the employers at the employees' expense.

The second critical area of legislative concern is the attempt in section 2 to revise the definition of "maritime employment" so as to severely restrict the jurisdiction of the statute. This effort to return the coverage of the Longshoremen's Act to pre-1972 lines for shipyard workers is without merit.

The fact that a worker may engage in these activities over the water on one day and perhaps in the interior of the yard on another day should no more subject that worker to the vagaries of a disability program than should the issue of which side of the gangplank the longshoreman is on.

The "water's edge" theory of coverage has had a long history of wreaking devastating economic harm on workers who, by happenstance, are employed in States with very low benefit protections.

The proposal in section 6(g) dealing with occupational disease would only create a morass of litigation, to the detriment of the injured employee and his family. The determination of coverage for an occupational disease should not be dependent on the law in the particular State where the worker was last exposed to the disease-producing stimulus.

The proposal in section 3(b) significantly alters the established defense of intoxication. This substitute offered in S. 1182 follows the language of the most regressive workers' compensation statutes.

Section 5 is objectionable in its attempt to remove freedom of choice from the injured employee. Testimony presented prior to the adoption of the 1972 amendments clearly evidenced that many of those physicians were responsive only to employer concerns of forcing injured workers back on the job and limiting the exposure of employers to liability for work-related injuries.

The statute in its present form provides the Department of Labor with extensive mechanisms to actively supervise the medical care rendered to injured workers, and we would hope that this statute would be enforced.

The 3-percent cap on annual cost-of-living adjustment given those on permanent disability or death benefits is unrealistic in an era of double-digit inflation, especially when imposed on those least able to help themselves.

Section 4(a) restricts the amount of compensation for disability or death benefits to 80 percent of the employee's spendable income. Only one State utilizes the spendable earning concept, and its workability has not been demonstrated.

Limiting disability payments to retirement age levels is a matter that cannot be viewed in isolation to this statute. No State of which I am aware has incorporated this limitation in their worker compensation statutes.

In conclusion, in reviewing S. 1182, one can only conclude that there is a conspiracy to turn the clock backward. Each of its provisions, only some of which are discussed in the testimony today, seem designed to promote the interests of the employers and carriers. The injured workers, who are reduced to relying on disability payments, are hurt by the consequences of the bill.

The injured workers are referred to by some of the advocates of this bill as liars, cheats, lazy, et cetera. Whenever something goes wrong, it is thrown on the backs of the unfortunate. The proponents say this program is costly and it is the claimants' fault.

Well, these accusations are unjustified and short-sighted. There are many reasons that problems exist in the Longshoremen's Act. We are willing to work responsibly with this committee to find solutions. However, the answers do not lie in this bill. All proposals smack of a regressive approach not suitable to enlightened employers, let alone this committee and Congress.

There may be abusers of the system, and this cannot be tolerated. However, one should not condemn an entire program because of a few rotten apples. One must not lose sight of the employees who are in desperate need of assistance during recuperation from their injuries or illness. The proposals in S. 1182 would penalize them by imposing insurmountable obstacles to their recovery.

Accordingly, we urge this committee to reject the measure currently under hearings and leave this law intact, or to limit amendments to those which can improve the process of restoration and return to work without the clearly Draconian and devastating effect on workers which would be accomplished by the bill before you.

Thank you.

[The prepared statement of Mr. Georgine follows:]

TESTIMONY OF ROBERT GEORGINE,
PRESIDENT
BUILDING AND CONSTRUCTION TRADES DEPARTMENT
AFL-CIO

Before the United States Senate Subcommittee on Labor, June 23, 1981

Testimony on the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1981.

Mr. Chairman and Members of the Subcommittee:

My name is Robert Georgine and I am here to testify in opposition to Senate bill 1182 on behalf of the more than four million members of the Building and Construction Trades Department of the AFL-CIO.

Mr. Chairman, our members are primarily involved in construction activities although a significant number work in industrial labor as well. These workers receive the protections of the Longshoremen's Act either directly or through various extensions of the Act's coverage. More than 14,000 are construction workers in the District of Columbia. Many thousands more are employed by numerous ship building and ship repair facilities. Our members also work on projects overseas and are included within the scope of the Longshoremen's Act through the Defense Base Act. Also, others are protected by the Outer-Continental Shelf extension.

Workers covered under this law, particularly construction workers, will frequently sustain more than a minor injury, sprain or even slight fracture. For these more grievous injuries, worker disability statutes including the Longshoremen's Act, are critical for survival. In the construction industry, an accident is not easily forgiven. A person may sustain a fall and suffer severe back injuries, paralysis, and, not infrequently, be killed. Heavy equipment takes its toll in concussions, multiple fractures and fatal accidents. Apparatus employed in cutting and shearing can cause a loss of a finger or arm despite utilization of protective devices and proper training of employees. Overall, the injury frequency rate for construction is among the highest of all industries. Moreover, shipbuilding and ship repairing also have high injury frequency rates.

Finally, there are the occupational illnesses occasioned by exposure to toxic fumes in painting, carpentry, welding, and heavy equipment operation. The construction industry possesses its own especially deadly occupational disease, asbestosis. Asbestosis, as you all know, is a serious respiratory disease which frequently leads to a very virulent and fatal form of cancer.

The potential combination of these crippling injuries and diseases is endless. The purpose of my recital is not for any theatrical display, but rather, to underscore the dangerous nature of the occupations performed by the workers we represent. Accordingly, we are justifiably concerned that in the event of a disabling injury or illness our members receive complete medical treatment and adequate economic protection.

II.

The Longshoremen's Act was originally enacted in 1927 to provide security for injured workers over navigable waters. In subsequent years, the Act was extended to apply to workers in private industry in the District of Columbia, in defense base activities, in non-appropriated fund activities, and on the Outer-Continental Shelf.

Not much has been mentioned concerning the problems engendered by the Act prior to the amendments of 1972. For over twelve years benefits were frozen and, consequently, there was a total failure to afford adequate compensation to injured workers. There also was a complete omission in providing adequate rehabilitation services to employees. The administration process produced grief in both employers and employees.

The 1972 Amendments were a direct result of the tremendous concerns raised by our membership over the virtual inadequacy of the statute in dealing with injuries incurred in the workplace. The employers were also distressed by the staggering cost of litigation sponsored by employees who were attempting to bypass the stringent limitations imposed by the statute.

The Amendments which have spurred an uproar within the employer community increased the monetary benefits and the medical protections, expanded the rehabilitation and medical monitoring obligations of the Secretary of Labor, and revamped the adjudication process.

The Amendments implemented many recommendations of the National Commission on State Workers' Compensation Laws which had been appointed by President Nixon in 1970 and submitted its report to Congress in early 1972. Congress recognizing the difficulties that confronted workers already on disability with the shrinking value of the benefits provided for an annual cost-of-living adjustment. A wage schedule was based on a percentage of the average weekly wage in order to avoid the pitfalls of a fixed dollar schedule chart which necessitated return to the legislature every year or two. The amendments granted the injured employee the right to select his or her physician to provide medical treatment. The Department of Labor's responsibility for proper medical monitoring, administration, and rehabilitation services was dramatically enlarged. The provisions regarding the award of legal fees was copied from the New York State Model Workers Compensation Code. In acknowledgement of the distressing problems that hampered the administrative and adjudicatory process of the Longshoremen's Act, the 1972 amendments created an adjudicatory system which was subject to the Administrative Procedures Act and utilized administrative law judges. The Benefits Review Board was established to review the administrative law judges decisions and the Board's determinations were appealable directly to the United States Courts of Appeals.

In short, the provisions adopted by Congress in 1972 incorporating the proposed recommendations suggested by the National Commission are reflective of the spirit and substance of needed reform measures that were due each and every workers' compensation program throughout this country.

III.

I should like now to turn to the matter of Senate Bill 1182 introduced by Senator Nickles and Senator Nunn which proposes substantial revision to the Longshoremen's Act.

The Building and Construction Trades Department is just as interested as any other citizen or organization in the prompt, effective and fair administration of workers compensation statutes. Proposals which legitimately aim at improving the administration and effectivity of worker protection laws deserve careful scrutiny and consideration. However, a fair reading of the entire Senate bill 1182 suggests that its authorship was promoted exclusively by the workers' compensation defense bar and those who wish to save money at the injured workers' expense. The past history of the Longshoremen's Act, particularly in the years immediately following the enactment of the 1972 amendments, clearly illustrates the exigency for careful monitoring of its administration and the importance of assuring adequate resources for fulfilling the responsibility of such a complex program as this. However, failure to provide adequately for administration of this statute in no way justifies the inclusion of the regressive provisions contained in this proposal.

There are a number of provisions to which I would like to address myself, but perhaps none is more important or indicative of the mischievous nature of the bill, than the proposal contained in Section 12 of S.1182 to eliminate the Section 20 presumptions of the Act regarding claims filed under the law. The statutory presumption of compensability, which appears as Section 20(a) of the Act reads as follows: "In any proceeding for the enforcement of a claim for compensation under this Act, it shall be presumed in the absence of substantial evidence to the contrary that the claim comes within the provisions of this Act." Three other statutory presumptions are included in this section - (1) that sufficient notice has been given to the employer regarding the injury, (2) that the injury was not occasioned solely by the intoxication of the injured employee, and (3) that their injury was not occasioned by the wilful intention of the injured employee to injure or kill himself. The presumptions are rebuttable and do not possess the character and force of evidence. When the employer offers substantial evidence in opposition, the presumption collapses.

Aside from the statutorily created presumptions, there also exist judicially created ones in all workers' compensation cases. The employer always has the ultimate burden of persuasion in these types of claims on the basis of policy considerations. In considering the proof rendered by the parties - all doubtful questions are to be resolved in favor of the injured employee or his family.

Statutory, as well as judicial, presumptions are evidentiary devices which permit judicial expendiency and places the burden on the party that is best able to bear it. If the presumptions in Section 20 are eliminated, the employee will be forced to initiate proofs which, for the most part, are self-explanatory. In all cases, the employee will be forced to hire an attorney and an already protracted litigation will be expanded. The employee will bear the cost and time, and at the same time, the claimants and their families will suffer without any income coming in.

The courts and Congress understand the remedial and humanitarian nature of the statute. Both the legislative, as well as judicial presumptions, reflect the strong policy of favoring awards in arguable case. Workers' compensation statutes are enacted for the benefit of the injured employees. The removal of the presumptions contained in Section 20 and the adoption of the other amendments in S.1182 would undermine the real purpose of the Longshoremen's Act and the advantages would be derived solely by the employers at the expense of workers.

It is interesting to note that these presumptions which are presently being assailed have been included in the Act since its inception. During the debates concerning the 1972 amendments, nothing was mentioned concerning any unreasonable burdens these presumptions might have placed on an employer. Even during the oversight hearings in both the House and Senate conducted in 1979 and 1980, the complaints concerning Section 20 were negligible. Section 12 of S.1182 is just part of an overall package to systematically annihilate any and every protection granted to employees whom the Act was intended to benefit.

The second critical area of legislative concern is the attempt in Section 2 of S.1182 to revise the definition of maritime employment so as to severely restrict the jurisdiction of this statute. This effort to return the coverage of the Longshoremen's Act to pre-1972 lines for shipyard workers is without merit.

The 1972 Amendments broadened the scope of the Act with respect to longshoremen, ship building, ship repair, and other maritime workers beyond the "water's edge" limitation to the shoreside. There has been substantial litigation in the past nine years to determine who fits within the extended coverage. Most of the construction workers who do benefit from the expansion of jurisdiction are within ship building and ship repair occupations. The fact that a worker may engage in these activities over the water on one day, and perhaps in the interior of the yard on another day, should no more subject that worker to the vagaries of a disability program than should the issue of which side of the gang-plank the longshoreman is on. The basis for the Amendments concerning jurisdiction and the reason we oppose the changes embodied in S.1182 is that it is unfair to the employees engaged in maritime activities to have their injury or illness benefits protection decided on the basis of where their assignments might place them on any given day or in the midst of any given task. The "water's edge" theory of coverage has had a long history of wreaking devastating economic harm on workers who by happenstance are employed in states with very low benefit protections. Workers injured on a pier by pier-based equipment and on the shore while unloading a vessel were considered outside the scope of the Act. Coverage for workers engaged in construction on a ship depended on whether the injury took place over the water or where the vessel was docked or whether the activity was repair or new construction.

This effort at legislating away the coverage gained in 1972 has been accompanied by a concerted effort on the part of many shipyard operators to convince the courts to so narrowly interpret Sections 2 & 3 of the Act as to make them illusory. Fortunately, lower federal courts and the Supreme Court in a number of cases have drawn a very reasonable and fair jurisdictional line in determining that these shipyard workers, whose work is decidedly related to the specific maritime activity, will receive coverage under the Longshoremen's Act. Clearly the case law as evolved has presented employers with settled guidelines for the purpose of resolving which of their employees are covered under this law and the occupations involved. There is no way to totally avoid jurisdictional litigation, whether S.1182 is enacted or whether the law stays as it is. There are always going to be gray areas in cases and it is for the administrative and judicial process to properly figure it out. Because there is already an established mechanism to decide jurisdictional issues, this amendment is unwarranted.

Section 6(g) is one of the more perplexing proposals included in S.1182. It adds a new provision dealing with occupational diseases to Section 8 of the Longshoreman's Act. In short, it says:

> Entitlement to compensation for disease alleged to be derived in any part from the claimant's occupation shall be determined by application of the substantive workers' compensation law of the state in which the last exposure to the disease producing or aggravating stimulus occurred.

Again one must speculate as to the reasons why this provision was included in S.1182. During the testimony submitted to the House and Senate on the oversight committees on the Longshoremen's Act, there were absolutely no complaints concerning problems with coverage for occupational diseases. The primary focus of the 1972 Amendments was to provide uniformity in compensating individuals engaged in similar employment. Section 6(g) of S.1182 would countermand the uniformity policy and substantially interfere with the rights of employees who suffer from occupational diseases.

This proposal may seem innocuous to a person who is unfamilar with the current divergence of state law regarding compensation for occupational diseases. It has only been of recent vintage that all of the state workers' compensation programs have provided general compensation coverage for occupational diseases. There still remain a signifiant number of states that attach special restrictions on the recovery for diseases, especially diseases related to dust. For example, in several states there are limitations on benefits for partial disability, in others there exist particularly strict rules on periods of exposure, and in some states the statute creates arbitrary rules as to the time of deaths or disability following exposure.

Upon examining the language of Section 6(g), one can easily perceive that it would create a morass of litigation and would certainly expand litigable issues to the detriment of the injured employee and his family. It also imposes an inequitable situation. The determination of coverage will be dependent on the state's law in which the worker was last exposed to the disease producing stimulus. This is a fortuitous element - a worker in one state who is exposed to the same stimulus as another worker in a second state may be denied compensation completely while the other worker may recover.

Obviously this provision will engender more disputes than it attempts to resolve. What if a worker, who may have worked in several states, is unable to determine by substantial evidence where the last exposure occurred? Will the federal courts properly interpret the state laws? What state law will apply if the worker is exposed over navigable waters, in D.C., or on a defense base?

The Longshoremen's Act is supposed to provide a comprehensive program to compensate injured employees. The rights and remedies are afforded to a defined class of employees. State compensation laws have no connection to the covered employees and these employees should not be penalized by the state provisions relating to occupational diseases. I say "penalize" because there is no chance that this provision will enlarge the coverage for occupational diseases under the Longshoremen's Act.

Section 3(b) of Senate bill 1182 significantly alters the established defense regarding intoxication. Under the current law, intoxication is an affirmative defense available to the employer only if the injury was occasioned solely by the intoxication of the employee. The new proposal allows intoxication as a defense if the injury was occasioned by the intoxication of the employee. The word solely was eliminated. Now, this may seem inoffensive. Why out of all the provisions incorporated in S.1182 should we harp on this one? Well, this proposed substitute for

Section 3(b) of the Longshoremen's Act follows the language of the most regressive workers' compensation statutes.

Misconduct of an employee, whether negligent or willful, is generally immaterial in compensation law unless a defense is specifically statutorily defined. In the various state workers' compensation statutes which contain the defense of intoxication, the requisite casual connection between the intoxication and the injury varies among the statutes all the way from mere existence of intoxication at time of injury to the requirement that intoxication be the sole cause. In reviewing the various states' provisions which contain intoxication as a distinct statutory defense, sixteen statutes require a direct causal relation in such terms as "injury due to", or "caused by", or "resulting from". Only four states have the similar phrase included in S.1182 - "occasioned by intoxication". Three states required that intoxication be the "proximate cause" and one court has interpreted this language to mean "sole and proximate cause". Six states have adopted the sole cause requirement reflecting the wordage in the present Longshoresmen's Act. One state has "primary cause" language; another has a "direct cause" requirement, and lastly one state has a "whole or partial cause" requirement.

This clearly shows that in fact the "sole causation" requirement that is presently in the Longshoremen's Act has support and is reflected in various state statutes. More states have the current language than the proposed bill's language. The worker's compensation laws supposedly eradicate fault principles. Since they are remedial statutes aimed at compensating workers for injuries "arising out of and in the course of their employment," the more liberal language that is found in the Longshoremen's Act should not be disturbed. The Amendments of 1972 were exhorted as a "model" for other state workers' compensation programs. The adoption of the proposals enunciated in S.1182 would not provide an appropriate "model" in that they would set the federal statute behind many of the state workers' compensation programs.

The provisions in Section 6 of S.1182 which set standards for the adjudication of hearing loss introduce an entirely new concept into the Longshoremen's Act. The regulatory process is knotty enough without the U.S. Congress being involved fixing the specific criteria for the determination of an occupational disease in the absence of sufficient evidence or knowledge warranting this course.

Occupational hearing loss is a very acute problem especially with workers in shipyards. The Department of Labor has been inudated with thousands of hearing loss cases and, until recently, these cases and their adjudication had caused a tremendous backlog much to the chagrin of all concerned parties. However, legislating hearing loss standards would be a serious error on the part of this Committee. The problems of initiating the appropriate standards are immense and even the medical profession is divided as to the proper standards that should be employed in the hearing loss adjudicatory process.

Congress does not possess the needed medical expertise. Hence, it has no business legislating special medical standards in such a technically complex area. It is precisely this kind of evolutionary process that revolves around occupational diseases and injuries that should remain in the hands of the administrative bodies that are qualified to handle it. Hearing loss has been singled out for unique treatment. There are many other occupational injuries and diseases suffered by workers who fall within the purview of this workers' compensation statute. Some are difficult to diagnose and others create controversy in the diagnosis. The answer to the inquiry about proper handling of occupational diseases is to acknowledge the resource limitations of the agencies. If sufficient research money, medical personnel, and administrative staff were enlisted, they could devise and implement proper standards.

Section 25 of S.1182 proposes to repeal Section 41 which provides for the enactment of safety and health standards for shipyard longshore activities. The maritime employees have urged for some years now for a return to the operation of Section 41 in lieu of OSHA as a way to deal more effectively with the high risks attendant to this industry. Indeed, we, in the building trades, have been confronted with a similar problem in whether or not to ask for a reinstatement of the Construction Safety Act. While we agree with the notion of uniformity as practiced under OSHA, we cannot help but observe that, symbolic though it may be, the repeal of Section 41 is called for in a bill which reduces overall benefits and protections for workers. I cannot believe that this Congress or, indeed, the sponsors of this legislation wish to be so callous as the provisions would suggest.

Section 7(a) of S.1182 would repeal the Section 8(d)(1) of the Longshoreman's Act which states that an employee who sustains permanent total disability but dies from other causes will still have a survivor's death benefit. This is a provision which recognizes that an employee who becomes totally disabled normally has no other economic resource aside from disability pay to provide for his family. The spouse and children are denied the benefit of prospective work and protection that could have accrued had the employee not been injured. The death benefit provision was a fair effort to protect the survivors of an individual who was struck down in the course of employment.

Unlike the egregious mistatement of fact contained in an editorial recently published by the Wall Street Journal, the family of this worker which receives the unrelated death benefit does not get those benefits if the worker is killed by a "grizzly bear" while on vacation. In order to get the benefits, the survivor must be related to someone who was permanently disabled by injury or illness under the Longshoremen's Act. One seriously doubts that permanently disabled workers have either the economic resources or the physical ability to go wandering in Yosemite National Park as suggested by that unfortunate editorial. The question is not whether this provision provides a so-called "life insurance" benefit for disabled workers, but rather, is it equitable for the employer to assume responsibility for the family of the permanently disabled worker in the same way that the employer assumes responsibility for the family of the worker killed on the job. It is a humane provision and one that ought not to be rejected out of hand by the Congress.

Section 5 of S.1182 is exceptionally irresponsible in its attempt to throw the injured workers back on the mercy of employer physicians. Testimony elicited prior to the adoption of the 1972 amendments clearly evidenced the fact that the panels of physicians selected by employers did not provide adequate medical treatment and care to injured workers. Many of those physicians were responsive only to employer concerns of forcing injured workers back on the job and limiting the exposure of employers to liability for work related illness and injuries.

Unfortunately, the rhetoric expounded in the attacks on the 1972 amendments continues to allege or imply that workers under the existing Longshoremen's Act have an absolute free choice in physicians. However, the statute explicitly states "that the employee shall have the right to choose an attending physician authorized by the Secretary to provide medical care under this Act as hereinafter provided." The statute also dictates in great detail the continuing obligation of the Secretary of Labor to actively supervise the medical care rendered to the injured worker.

Consequently, if there exists questions as to the competency of medical treatment rendered or the evaluation of the employee's injuries, these can be appropriately dealt with by a responsible administration under the present law. There is no need for a return to a system where the employer selects the physicians who will render care to the employees. Employees understand the nature and seriousness of their injuries and are capable of choosing the appropriate specialists for the care they may require. It is presumptuous to suggest that the employer through some partriarchal noblesse oblige has an inherent ability to more properly select treating physicians than the injured worker.

Moreover, the existing statute already guarantees the employer the right to challenge the physician selected by the employee, and the employer may require the employee to submit to an examination conducted by the employer's physician. If one reviews the case histories of the claims filed by workers under this statute, they reflect the employers' extensive use of this right to double-check the medical evidence.

The 1972 Amendments on medical care were very carefully crafted and, indeed, represented the recommendations of both the National Commission and other experts in the field at the time.

There is no evidence to suggest that the provisions in the statute warrant any change. As a secondary matter, some sections in S.1182 relating to medical care, particularly those concerning the scope of the employer physician's examining responsibilities and limitations imposed on the physician's judgment, are actually administrative regulations which should properly be delegated to the Secretary of Labor.

Section 8(b)(2) of S.1182 limits the annual cost-of-living adjustment given those on permanent disability or death benefits to 3% per year. Even assuming that it may be reasonable to levy some limitation on the annual cost-of-living adjustments to those on disability, it seems most repressive and cheap in an era of potential double digit inflation to confine an increase to a 3% per year adjustment for those persons who are the least able to help themselves.

Section 4(a) of S.1182 restricts the amount of compensation for disability or death benefits to 80% of the employee's spendable income. In virtually all the state workers' compensation programs and the current Longshoremen's Act, the traditional figure of 66 2/3 percent of the employee's earnings has been used. A change should be considered cautiously by this Committee. While it is true that the National Commission recommended the use of a spendable earnings concept as an alternative method of determining compensation, it is also clear that this concept has not been thoroughly tested. Only one state, Iowa, utilizes the spendable earning concept and the verdict of its acceptability and application to the more highly intricate earning schedules has not been demonstrated. The Department of Labor, responsible for administering this law, has never conducted an analysis to discover if the spendable earnings limitations ought to be interposed.

It is clear that the idea of spendable earnings has been suggested as a way to limit benefits under this Act. This alternative method is based on providing the lesser of the computed figures. However, these limitations for high paid workers are questionable at best. It is frequently not understood by even those with great familiarity of workers' disability statutes that for employees the 66-2/3% of wages represents an absolute maximum which they can receive as a benefit under this statute. The average weekly wage determinationsas contained in Section 6(b)(1) of the Longshoremen's Act, are an effort to approach the absolute maximum that a highly paid worker could receive, but still include most of the blue collar work force by allowing them the full two thirds. No formula should be considered that would restrict regular hourly workers from receiving the full benefits of the two-thirds limitation. I am certain that the 80% of the spendable earning would reduce the compensation of construction workers who receive higher wages to less than the two-thirds requirement in the law. Such a limitation is extremely regressive and wholly unwarranted.

Section 6(b) of S.1182 states that an employee's temporary total disability payments be suspended when an employee attains "retirement age." Section 6(b)(4) also says that temporary or permanent partial disability payments shall be extinguished when the employee reaches "retirement age."

The question of limiting disability payments to retirement age levels is a matter that ought not be viewed in the isolation of this statute. Subjecting a disabled worker to substantially lower social security benefits, or a potentially lower retirement plan for which they may or may not be eligible, is a very serious social judgment and not one to be experimented with in this industry without a very careful study of its ramifications. There is no evidence on the cost savings or cost benefits to our economy by this approach and it is clearly not warranted at this time without very careful evaluation of the integration of our social benefit programs.

The other proposals dealing with permanent partial disability benefits in S.1182 suggests a penalty on employees who under the proposed provisions would be forced to return to work before they are adequately ready for such activity. Most particularly, the implication of this statute is that the specific payment for the enumerated list of inujuries is sufficient to account for all of the reduction in wage earning capacity over the individual's working life. Not only is this inhumane, it is clearly an attempt to buy out cheaply serious injuries, even though the employees may have their entire economic future reduced substantially.

Section 19 of S.1182 precludes recovery of the claimant's legal expenses, including attorney's fees, from the employer or carrier unless the employer refused to pay anything on a claim that proved to be valid. Under the Longshoremen's Act, as it is presently written, a claimant is also entitled to an award for legal fees from the employer or carrier if a controversy arises over additional compensation. If such a dispute arises, the deputy commissioner is to conduct an informal conference and submit a recommendation to the parties. If the employer refuses to comply, it may pay or tender an amount of compensation it believes is due. If the employee utilizes the services of an attorney to gain additional compensation, the employer is responsible for a reasonable attorney's fee based upon the difference between the amount awarded and the amount tendered or paid.

This process envisions that disputed claims will be settled expediently and efficient use will be made of the informal conferences. This is a benefit to an employee who has been injured and whose sole source of income is derived from disability payments. The emphasis is properly on a fair settlement without protractive delays and litigation.

The proposals offered by Section 19 of S.1182 would have a detrimental effect on the quality of representation that an employee would receive where there exists a contention concerning the degree or length of disability rather than whether there is any disability at all. This is an arbitrary distinction and would certainly work to the disadvantage of the injured employees.

Under Section 28(b) an employer may avoid the payment of the claimant's legal fees if it offers to submit the case to a physician for an independent medical examination and agrees to pay whatever compensation is indicated by the independent examination before the examination is made. Again, this is a fine illustration of a settlement mechanism. In the long run, it is in the best interest of all parties to promote out of court settlements. Like plea-bargaining in criminal cases, settlement provides more court time for the real controverted issues and cases.

There are various other proposed changes of the Longshoremen's Act which leave one with the gut impression that the proposers of the legislation meant to deride the injured employees who resort to the statute. Section 9 of S.1182 provides for the absolute forfeiture of employees' rights under the statute if he/she fails to notify the employer of injury or death within certain prescribed times. The current statute allows the employee the opportunity to establish an excuse if there is no showing of prejudice to the employer.

Section 21 of S.1182 makes it a felony for an employee to make a false or misleading statement to obtain benefits under the statute. Under the current statute, the penalty is a misdemeanor.

Section (6)(1)(2) sets forth that a settlement shall not be disapproved by the deputy commissioner unless it is found to be grossly inadequate or procured by duress. The current law protects employees from overreaching by employers by ensuring that the Deputy Commissioner approve a settlement only if it is in the best interest of the employee.

Section 13 of S.1182 says that an employer does not have to pay an award while it is appealing. Under the present formula, the employer must pay the award unless he obtains a stay which will be granted only if undue hardship is proven.

These examples illustrate the callous attitude towards employees that permeates the statute.

Conclusion

In reviewing S.1182, one can only conclude that there is a conspiracy to turn the clock backwards by at least fifty years. Each of its provisions, only some of which are discussed in my testimony, are designed to promote only the interests of the employers and carriers. The injured workers who are reduced to rely on disability payments are derogated by the proponents of this bill. The injured workers are referred to by the proponents as liars, cheats, lazy, etc. Whenever something goes wrong, it is thrown on the backs of the unfortunate. The proponents say this program is costly, and it is the claimants' fault.

Well, these accusations are unjustified and short-sighted. There are many reasons that problems exist in the Longshoremen's Act. We are willing to work responsibly with this Committee to find solutions, However, the answers do not lie in this bill. All the proposals smack of a regressive approach not suitable to enlightened employers, let alone, this Committee and Congress.

There may be abusers of the system and this cannot be tolerated. However, one should not emasculate an entire program because of a few rotten apples. One must not lose sight of the employees who are in desperate need of assistance during recuperation from their injuries or illness. The proposals in S.1182 would penalize them by imposing insurmountable obstacles to their recovery.

Accordingly, we urge this Committee to reject the measure currenty under hearings and leave this law intact, or to limit amendments to those which can improve the process of restoration and return to work without the clearly draconian and devastating effect on workers which would be accomplished by the bill before you.

Senator NICKLES. Thank you, Frances.

Mr. Abbott?

Mr. ABBOTT. Yes, Mr. Chairman. My name is Ande Abbott and I am an international representative working for the International Brotherhood of Boiler Makers, Iron Ship Builders, Blacksmiths, Forgers & Helpers.

My international represents approximately 45,000 workers in the shipbuilding and ship repair industry in this country. These industries are among the most hazardous that there are in the country.

Just 9 years ago, because of the wisdom and compassion of the Congress, the workers in the shipyards became covered by one of the most comprehensive and compassionate compensation bills that we have ever seen. The amendments that we have before us now for discussion turn back the clock. Compassion and wisdom seem to be giving way to unbearable injustices once again, where the suffering of an injured worker is compounded by starving him while his wounds heal.

I am here today on behalf of the 45,000 workers we represent to convey to you our strong opposition to any amendment to this bill which takes away any benefits currently received by injured workers.

Without good injury compensation programs, the workers will continue to be the victims of not only job-related injuries, diseases and death, but of a social insurance program purposefully kept inadequate by profit-gouging insurance companies and some employers. Good compensation programs and effective occupational safety and health programs must go hand-in-hand to benefit not only the workers and employers, but the country as well.

Maritime employers complain of high insurance premiums, and these premiums are not derived from the act itself but because of how the law is administered. The lack of uniform rates throughout the Nation and the lack of accountability on the part of insurance carriers are major problems and are shortcomings in good administration rather than in the act itself.

The current language of this act was enthusiastically supported by the maritime industry in 1972. It was not shoved down their throats; the law was to the mutual advantage of both sides. In the interim period after enactment, however, the insurance carriers, working unchecked by Government and uncontrolled by administrative means, increased the premium cost many times over.

Attempts now to move the act's benefits to the water's edge are ridiculous and illogical. The maritime industry often allows individual workers to work both in shops and aboard ships, sometimes switching back and forth during the course of the day. The idea that they would be covered one second and not covered the next just seems to me to be totally crazy. We can just see no justification at all for back up to the water's edge.

Nothing in this bill recognizes the cost problems associated with insurance industry ratemaking. The approach in the proposed amendments cuts back on the adequate and equitable benefit standards.

I have mentioned only a few of the many problems that we have, but I did cut my statement short, Senator. I did want to mention three items which we think must have: one, provide administrative remedies to make insurance carriers justify rates and rate increases and cause disclosure of premium-benefit payment ratios; two, improve the safety and health environment in which our workers must perform work which will reduce injury rates and therefore employer operating costs; and three, enact Federal minimum standards for State worker compensation laws, which dismally fail to provide even minimum protection to injured workers. This provision would offset the competitive disadvantage that employers covered under the Longshore Act now encounter.

I thank you, Senator.

[The prepared statement of Mr. Groton follows:]

STATEMENT OF THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS, AND HELPERS AFL-CIO ON THE 1981 AMENDMENTS TO THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE. I WISH TO THANK THE COMMITTEE FOR ALLOWING US THIS OPPORTUNITY TO PRESENT OUR VIEWS ON AMENDMENTS BEING PROPOSED ON THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

MY NAME IS PAGE GROTON AND I AM THE ASSISTANT TO THE INTERNATIONAL PRESIDENT OF THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO.

THIS INTERNATIONAL UNION REPRESENTS APPROXIMATELY 45,000 WORKERS IN THE SHIPBUILDING, SHIP REPAIR INDUSTRY IN THIS COUNTRY. THESE INDUSTRIES ARE AMONG THE MOST HAZARDOUS INDUSTRIES IN THE COUNTRY. JUST NINE YEARS AGO, BECAUSE OF THE WISDOM AND COMPASSION OF CONGRESS, THE WORKERS IN THE SHIPYARDS BECAME COVERED BY ONE OF THE BEST COMPENSATION LAWS IN THIS COUNTRY.

THE AMENDMENTS WE HAVE BEFORE US FOR DISCUSSION TURNS BACK THE CLOCK. COMPASSION AND WISDOM SEEMS TO BE GIVING WAY TO UNBEARABLE INJUSTICES ONCE AGAIN, WHERE THE SUFFERING OF AN INJURED WORKER IS COMPOUNDED BY STARVING HIM WHILE HIS WOUNDS HEAL.

I AM HERE TODAY ON BEHALF OF THE 45,000 WORKERS WE REPRESENT TO CONVEY TO YOU OUR STRONG OPPOSITION TO ANY AMENDMENT WHICH TAKES AWAY BENEFITS NOW BEING RECEIVED BY INJURED WORKERS.

THE "LONGSHORE ACT" AS IT IS CURRENTLY WRITTEN WAS INTENDED TO BE A MODEL FOR OTHER INJURY COMPENSATION PROGRAMS INCLUDING THE STATE COMPENSATION PROGRAMS. TODAY, MANY STATE PROGRAMS FAIL TO MEET EVEN MINIMUM BENEFITS OFFERED IN THE LONGSHORE ACT. IF CONGRESS BEGINS TO MODIFY THIS "MODEL" PROGRAM NOW, IT WILL SURELY SIGNAL SOME STATES TO REDUCE BENEFITS IN THEIR PROGRAMS AS WELL. THE AFFECT WILL BE MUCH GREATER THAN THE ONE MILLION PLUS WORKERS NOW COVERED UNDER THIS ACT.

WITHOUT GOOD INJURY COMPENSATION PROGRAMS, THE WORKERS WILL CONTINUE TO BE THE VICTIMS NOT ONLY OF JOB-RELATED INJURIES, DISEASES AND DEATH, BUT OF A SOCIAL INSURANCE PROGRAM PURPOSELY KEPT INADEQUATE BY PROFIT-GOUGING INSURANCE COMPANIES AND SOME EMPLOYERS. GOOD COMPENSATION PROGRAMS AND EFFECTIVE OCCUPATIONAL SAFETY AND HEALTH PROGRAMS SHOULD GO HAND-IN-HAND TO BENEFIT NOT ONLY THE WORKER BUT THE EMPLOYER AND THE COUNTRY AS WELL.

MARITIME EMPLOYERS COMPLAIN OF HIGH INSURANCE PREMIUMS. THESE PREMIUMS ARE NOT DERIVED FROM THE ACT BUT BECAUSE OF HOW THE LAW IS ADMINISTERED. THE LACK OF UNIFORM RATES THROUGHOUT THE NATION AND LACK OF ACCOUNTABILITY ON THE PART OF INSURANCE CARRIERS ARE A MAJOR PROBLEM AND ARE SHORTCOMINGS IN GOOD ADMINISTRATION RATHER THAN THE ACT ITSELF.

THE CURRENT LANGUAGE IN THE ACT WAS ENTHUSIASTICALLY SUPPORTED BY THE MARITIME INDUSTRY IN 1972. IT WAS NOT SHOVED DOWN THE THROATS OF THE EMPLOYERS. THE LAW WAS TO THE MUTUAL ADVANTAGE OF BOTH SIDES. IN THE INTERM PERIOD AFTER ENACTMENT, HOWEVER, THE INSURANCE CARRIERS WORKING UNCHECKED BY GOVERNMENT AND UNCONTROLLED BY ADMINISTRATIVE MEANS, INCREASED THE PREMIUM COSTS MANY TIMES OVER. ATTEMPTS NOW TO MOVE THE ACT'S BENEFITS TO THE WATER'S EDGE IS RIDICULOUS AND ILLOGICAL. THE MARITIME INDUSTRY OFTEN ALLOWS INDIVIDUAL WORKERS TO WORK BOTH IN SHOPS AND ABOARD SHIPS. THE IDEA OF SEPARATE COVERAGE BETWEEN STATE AND LONGSHORE ACT PROGRAMS AMONG WORKERS WITH THE SAME COMMUNITY OF INTERESTS IS PROVIDING UNEQUAL TREATMENT, ADDS CONFUSION TO ENTITLEMENT, CAUSING MORE LITIGATION BETWEEN PARTIES AND ALLOWS WORKER COVERAGE ONE MINUTE AND NO COVERAGE SECONDS LATER. WE CAN SEE NO JUSTIFICATION FOR BACKING UP TO THE WATER'S EDGE FOR BENEFIT ENTITLEMENT.

WE ALSO SEE NO JUSTIFICATION FOR CHANGING THE ACT BY CREATING AN EMPLOYER SELECT PANEL OF DOCTORS TO PROVIDE MEDICAL CARE. WE SUPPORT A FREE CHOICE OF PHYSICIAN BY THE EMPLOYEE.

THE PROPOSED CHANGES IN THE ACT TO ALLOW THE EMPLOYER TO DICTATE INDEPENDENT EXAMINATIONS IS UNACCEPTABLE AND SUBJECT TO ABUSE BY EMPLOYERS.

WE ARE IN TOTAL OPPOSITION TO THE PROPOSAL TO ELIMINATE COMPENSATION FOR "NON-RELATED DEATHS". THE CRITICISM OF THIS SECTION IS THAT IT IS SIMILAR TO LIFE INSURANCE. THE HARDSHIPS ON SURVIVORS CAUSED BY "NON-RELATED DEATHS" ARE THE SAME HARDSHIPS ENCOUNTERED BY SURVIVORS FOR RELATED DEATHS. WE FEEL THERE SHOULD BE NO CHANGE. PLACING A 3 PERCENT ANNUAL LIMIT ON COMPENSATION C.O.L.A.S. WILL ERODE PURCHASING POWER IN A PERIOD OF RAPID INFLATION. IT IS OUR OPINION THAT PEOPLE ON FIXED INCOMES SHOULD BE PROTECTED AGAINST THE RISING COST OF LIVING. THE PROPOSED AMENDMENTS REMOVE ALL REBUTTABLE PRESUMPTIONS FROM THE ACT. THE PRESUMPTIONS, THE CARE OF ANY DECENT WORKERS' COMPENSATION ACT, SERVES TO PROTECT THE RIGHTS OF BOTH EMPLOYERS AND EMPLOYEES. WE OPPOSE THEIR REMOVAL. THERE ARE MANY PROPOSED AMENDMENTS TO THE LONGSHORE ACT. HOWEVER, NONE DEALS WITH OR RECOGNIZES THE COST PROBLEMS ASSOCIATED WITH THE INSURANCE INDUSTRY RATE-MAKING. THE APPROACH IN THE PROPOSED AMENDMENTS CUT BACK ON ADEQUATE AND EQUITABLE BENEFIT STANDARDS. I HAVE MENTIONED ONLY A FEW OF THE MANY PROBLEMS WE HAVE WITH THE PROPOSED AMENDMENTS.

IN CONCLUSION, WE EMPHASIZE THAT NO CHANGE IN THIS LAW IS NEEDED, AND WE OFFER THE FOLLOWING SUGGESTIONS:

1. PROVIDE ADMINISTRATIVE REMEDIES TO MAKE INSURANCE CARRIERS JUSTIFY RATES AND RATE INCREASES AND CAUSE DISCLOSURE OF PREMIUM-BENEFIT PAYMENT RATIOS.
2. IMPROVE THE SAFETY AND HEALTH ENVIRONMENT IN WHICH OUR WORKERS MUST PERFORM WORK WHICH WILL REDUCE INJURY RATES AND, THEREFORE, EMPLOYER OPERATING COSTS.
3. ENACT FEDERAL MINIMUM STANDARDS FOR STATE WORKER COMPENSATION LAWS WHICH DISMALLY FAIL TO PROVIDE PROTECTION TO INJURED WORKERS. THIS PROVISION WOULD OFFSET THE COMPETITIVE DISADVANTAGE THAT EMPLOYERS COVERED UNDER THE LONGSHORE ACT NOW ENCOUNTER.

I THANK YOU AGAIN FOR THIS OPPORTUNITY TO APPEAR BEFORE THIS COMMITTEE TODAY. NOW, I WILL GLADLY TRY TO ANSWER ANY QUESTIONS YOU MIGHT HAVE.

Senator Nickles. Thank you very much. I appreciate your statement and I look forward to working with all of you.

I will start in reverse order. Jay, there were a couple of things that you mentioned. I would have to turn back to your statement to catch it, but you talked about the dramatic increase in compensation, which was primarily due to inflation.

I look over at that chart over there and I see that inflation, since the 1972 amendments, has increased 97 percent, which is drastic, as we all know. It has cut the value of our dollar in half. I also look over at longshore benefits and they increased 550 percent, which is 5½ times the rate of increase of inflation. I do not know that we can blame it on inflation.

Mr. Power. Mr. Chairman, I will have Mr. Smedley of our Social Security Department answer the question.

Mr. Smedley. I noticed your chart there, Mr. Chairman. I think it is a little bit misleading.

Senator Nickles. Pull your microphone up, if you would, Mr. Smedley; I would appreciate it.

Mr. Smedley. OK, fine. Can you hear me now?

Senator Nickles. Yes; thank you.

Mr. Smedley. The chart is a little misleading, because what you did—you had in the act for many, many years a $70 maximum. Because of the liability issue under the unseaworthiness doctrine, people were unable to amend the act. The $70 became basically a flat benefit.

If you would go back to when the $70 benefit was first put in, your comparison would be more fair and it would be more accurate.

The second thing is that you used the maximum. What you did with the maximum—you went to 200 percent of the average wage in the industry. That was put in partly because of the recommendation of the National Commission on Workers' Compensation. Mr. Erlenborn does not object to it; you say you are not taking it out of the bill.

But it is very unfair when you put in a maximum which affects very few workers and you say that that does not keep up with indices. You are correcting a major flaw in the bill of an inadequate maximum. It does not reflect an increase in indices, with the Consumer Price Index or the national average weekly wage.

I would point out to you that if you take what the average worker in the industry is getting and go back to when the $70 was put in and how long that was in, you may find that the figures would completely reverse themselves. So, I am saying that this is a very poor comparison.

The other point I would make is that you have an increase by average wages in the act, and prices have gone up ahead of wages. So, people who were getting benefits since the amendments in 1972 have gotten less than the cost of living. So, if you take that as an index of the measurement of people who were on the rolls since 1972—say a permanently disabled person or somebody getting a permanent partial disability benefit—they have lagged behind inflation.

So, I think there are two sides to these things, Senator; you have to put them in perspective.

Senator NICKLES. I do not know that I agree with that; I do not know that I want to debate it because I have some other questions and we do have another panel. I will throw out a couple of things.

I think that most everybody at some time in their statement had said—at one time, it was said that this was a Draconian move to step back into some other cold time where we were very antiworker, or something like that. I personally take issue with that because I had some input into this legislation.

I do not see it as Draconian. I still see that benefits are very generous—still the most generous workers' compensation program anywhere in the country, much less the world. You alluded to the fact that not too many people were receiving maximum benefits.

I think earlier testimony we had was originally written for longshoremen and those people that were not covered by other coverage, were receiving benefits that would allow them to receive maximum benefits.

To compute the $456—the 200 percent of the average weekly wage as it now is—that is equivalent to about $24,000 tax free income; that is equivalent to about $30,000-some before-tax income. I do not see that as starving the injured worker. You know, $24,000 of tax-free income with unlimited escalators is not exactly starving them.

We have proposed to leave that 200 percent alone, so individuals permanently and totally disabled could still receive $24,000 of tax-free income. That amount would increase as the average weekly wage would increase. However, we would put a cap of 3 percent on the escalator so it would not be totally uninsurable, because people cannot project future costs—well, I think you probably realize that.

Frances, I was kind of alluding most of this statement about the starving—I see still a very, very generous plan of benefits under S. 1182 or H.R. 25 for the person who is legitimately disabled. Those people who are not able to perform work and earn wages would still be adequately compensated under these bills. I would just dispute the statement that we are going to be taking that away.

We might be taking away claims that somebody might make under a fraudulent area, but I would certainly concur with some of the statements that were made that there are a lot of legitimate claims, and we want to take care of those people. It is certainly not our intention or goal to restrict those people from receiving adequate and fair compensation.

I guess I will conclude with a question. Do you not think that that compensation should be less, or certainly not greater than the compensation they received prior to their injury? Should you make more money disabled or working?

Ms. ZWENIG. Not to step back from the points I made in my testimony, but a large percentage of the workers that the Building and Construction Trades Department represents would be stripped of coverage from this act, should S. 1182 pass.

When you look at the various provisions——

Senator NICKLES. I will get to definitions in a minute, on who is covered.

Ms. ZWENIG. Right.

Senator NICKLES. Talk about the benefits and whether or not we are really—answer my question. Will the benefit section that we have starve the people who are entitled to those benefits?

Ms. ZWENIG. Well, just to clarify my use of the word "Draconian," it came in my conclusion and it was with respect to the effect of the entire bill, when you go through section by section and you look at the cumulative effect of the bill. It was not necessarily referring to a particular issue.

With respect to the benefits, we made the point—all three of us, I think—that there might be abuses in the programs—abuses that can be corrected through proper administration of the act. None of us would object to that. In fact, we would like to see continued oversight hearings and discussions of individual cases that might give you pause. We would say that the thrust of the act is beneficial.

I was not here for the ILWU's testimony, but I believe there was an allusion in that testimony to studies done by the States of Washington and Oregon, where they did away with third-party insurers. I believe the studies there showed that the benefits have not out-paced the growth of related economic indices. We would like to see that sort of evaluation continued in the context of these hearings.

Mr. SMEDLEY. Mr. Chairman?

Senator NICKLES. Do you feel like the benefits under S. 1182 are adequate? I am talking about the 200-percent maximum; I am talking about the other basic benefit provisions.

Mr. SMEDLEY. Mr. Chairman, I would point out that under the present act, the most you can get is two-thirds of wages, up to the maximum; if you are above that, you could even get less than two-thirds.

Senator NICKLES. Tax free.

Mr. SMEDLEY. Yes, but you lose fringe benefits, too. As you know, the great growth in fringe benefits has been tremendous in recent years. You lose those, Senator, and they are worth a great deal and they are not figured in your two-thirds. So, you know, there are compensating factors.

But I was very interested in hearing Congressman Erlenborn's comment about meeting the standards of the National Commission on Workers' Compensation under spendable earnings. I would point out that the spendable earnings recommended by the National Commission is different than the spendable earnings that you provide in the bill.

Senator NICKLES. I noted that in your——

Mr. SMEDLEY. Even under the present law, it is somewhat less than perhaps what the National Commission would recommend. So, what you do in a sense is you reduce the 66⅔ under the present bill, and a lot of workers would get less—not all, but a lot would.

But let me read you a quote——

Senator NICKLES. Let me clarify that statement. You are saying that the 80 percent of spendable income would be more or would be less than the two-thirds of gross income?

Mr. SMEDLEY. For a lot of workers, it would be less.

Senator **Nickles**. For a lot of workers, it would be less. In other words, the two-thirds of gross, tax-free, is more money than 80 percent of net?

Mr. **Smedley**. For some workers.

Senator **Nickles**. In other words, two-thirds of gross is pretty close to their take-home pay, and in some cases it is possibly more?

Mr. **Smedley**. Sure, but they lose in fringe benefits. Let me point out to you, Senator, that it is never said when we talk about wage laws that what a worker has given up in workers' compensation is the right to sue.

If I get hit by a taxicab on the way back to the office and I am severely injured, whatever benefits I may be entitled to from my employer or from social security or disability, if I am permanently and totally disabled—I can file a suit against the person responsible in that accident and collect that, totally separate and without any impact, and I could get pain and suffering. As you know, the way the liability suits are running these days, it is a pretty good settlement.

But if a worker suffers a permanent partial disability—if that worker is young and loses a hand—even if you compensate him adequately for wage loss, the loss of that hand or leg has a tremendous impact upon his personal life. It affects, perhaps, his chances of dating, his marriage; the things he can do in life—playing baseball and various other sports. If it is bad legs, he cannot go out and romp with his young son; he cannot go hunting with him. He will go fishing, maybe.

All of these things are not compensated for in workers' compensation. They are permissible, if you have liability suits and the right to sue, to be considered as part of the settlement.

But never let us forget in the back of these injured and maimed workers that these factors are still there. But let me read you a statement about the spendable earnings concept that the National Commission recommended and Mr. Erlenborn said he was in compliance with.

> Because our preference is for benefits to be based upon spendable earnings, which represent only a portion of gross earnings, and because total remuneration is increasingly greater than gross earnings and because of the growing importance of supplements, we believe that a traditional proportion—two-thirds of lost wages—is too low.

So, they did not have the same kinds of deductions to get to the spendable earnings level that you do. They were doing it because they thought two-thirds was too low because of the fringe benefit problem. So, I think that should be a factor that you should consider.

Senator **Nickles**. Let me ask a couple of other questions, because I think all the panel members talked about this National Commission.

I believe the National Commission also recommended caps on benefits. I think they also recommended not paying for unrelated death benefits. Do you concur with the National Commission in those two areas?

Mr. **Smedley**. Well, it was a good report. I may say it was a commission appointed not by a Democrat, but by a Republican President—President Nixon. It was not exactly what you would call a stacked liberal commission.

On the unrelated death benefit, though, as you may have noticed from the statement—the point here is that even though the worker may have died from causes unrelated to the accident, if he is unemployed because of the accident and does not work or has suffered a wage loss, he will unlikely have life insurance because he usually gets most of that through his employment. He will definitely lose pension rights in many cases and have no pension benefits for his survivors. His social security will be much less because it is a wage-related benefit based on wages and contributions made.

So, the economic effect on his family is very significant, even though the cause of death may have been for other reasons. So, there are factors there for giving some compensation to the family even though he died from unrelated reasons.

Senator **Nickles**. We have basically the Longshore Act——

Mr. **Smedley**. I would say it is also very inexpensive. I do not know about the longshore industry, but I suspect that in the District of Columbia there are no more than two unrelated death benefit cases a year. So, it is not a costly item to the system.

Senator **Nickles**. Let us look at that just to go a little bit further. Let us assume that a person is entitled to receive maximum benefits and an unrelated death does occur. You say the cost is not significant. I have seen figures where that cost could approach $800,000 to $1 million, depending on the individual case.

Mr. **Smedley**. The individual case.

I was speaking in terms of cost to the system.

Senator **Nickles**. That is a lot of money.

Mr. **Smedley**. Sure, it is a lot of money, in a sense. But if you take a 22-year-old worker and you project it out to 40 to 45 years of a work life, and you take inflation into consideration and you say, "Well, this will add up to $800,000 or $1 million," it looks like a lot of money.

But if you do what an actuary does and put that in present value and discount what you think the interest rates or inflation will be and bring it back to its present value, it is a much less amount of money. You have to be careful how you quote money, because if you would go back to 1935 and look ahead 40 or 50 years as to what incomes and salaries are, they look astronomical. So, you have to be careful how you use figures a little bit, Senator, in this regard.

I can see that that is a lot of money, but to the total system, it is not an expensive item. It can, in an individual case, add up to a significant amount of money; that is true.

Senator **Nickles**. But you did state that in your justification. Basically, we are talking about a social need, and you are talking about a social need for life insurance and pensions. The Longshoremen's Act is basically acting as a supplement for pensions and life insurance, which is not the intent of the act.

The intent of the act, as I think we would all agree, was basically protection for the injured worker, to supplement his wages while he or she may be injured during the course of their employment, and not to basically provide that supplement. I think the interpretations that have been made and the expansion of the act into that type of coverage are greatly responsible for the astronomical increases. That is not a small increase.

If we look at the number of claims, they have gone up 2½ times in a period of 7 years. I do not think it is more hazardous to work on the docks now than it was before.

I think it is because people have found a very lucrative—I would like to have tax-free income, you know. We look at the idea of very large settlements that are tax-free; it is very, very inviting for people. It does not take away from our desire to provide adequate compensation for those people who are injured on the job.

When you have unrelated death benefits, tax-free for life, uncapped with escalators, you are talking about an enormous benefit that people do not want to provide or insure and cannot afford. I will put it like that.

The net effect—and I would like to get on this point just for a second—is that in many cases, I think this law is hurting a lot of the people that you want to represent. I think it is denying some people some jobs. I think that is the reason why you are seeing traffic going to Canada. If I were an employer and somebody told me that I was going to have to pay 87 percent or 60 percent or 50 percent of my payroll in workers' compensation, I would be looking for another field.

Mr. POWER. Well, Senator, if we could respond to something you said earlier about it being more safe to work on the docks now than it was prior to these amendments or perhaps in the last decade, if I could refer back to the testimony of the ILA and the ILWU last week, they extended to you and to the other members of the committee an invitation to tour the docks and to see first-hand the kinds of hazards that workers in this environment suffer.

Let me reiterate on behalf of the AFL–CIO that the very reverse is the case. The injuries and deaths on the docks are worse now than they were in the past.

Senator NICKLES. Can you substantiate that?

Mr. POWER. We certainly can.

Senator NICKLES. I am not talking about the number of claims; I mean actual deaths.

Mr. POWER. We would like again to repeat their offer for you and the members of the committee, perhaps, before you go to markup—I do not know if you are going to have any more days of hearings—to see firsthand what it is like on the docks.

The construction industry has the highest rate of injury and death of any industry in the country. So, when we talk about claims—of course, there are going to be more claims. You had a chart last week, which may or may not still be up there, showing this amount of increase. Well, everybody expected that there would be an increase in claims once these amendments were approved. This became the vehicle and the system for claims to be made. So, there should be no great surprise that there has been an increase in claims.

Senator NICKLES. The changes were made, Mr. Power, in 1972, and if we remember the chart, claims increased in 1973; they increased in 1974. They have increased every single year. I cannot imagine that it is progressively becoming more and more hazardous on the docks.

I will visit the docks; I am not sure exactly when and where. I have a hard time imagining the relationship between the increase in the number of claims and the hazardous nature of the job, particularly when we have had testimony from others saying that it is safer.

I do not really want to debate it, but I have a hard time looking at the number of claims and seeing that it is two and a half times higher, or when we talk about the testimony that just came about the 6,000 workers working for the D.C. Transit System and they had 3,000 claims. I have a hard time seeing that it is that hazardous to drive a bus or a railcar, or whatever it is; that we would have 3,000 claims. They had to offer an incentive system not to abuse the system.

There is some abuse, and I think we all realize that. We are not trying to detract from the people that have legitimate claims, and I hope you realize that. We will work together to see if we cannot change it.

Mr. **Elisburg**. Mr. Chairman?

Senator **Nickles**. Let me move just a little bit further.

Mr. **Elisburg**. May I comment on your chart for a minute, sir?

Senator **Nickles**. Please do.

Mr. **Elisburg**. I think it is important in looking at the number of claims filed——

Senator **Nickles**. Is it Mr. Elisburg?

Mr. **Elisburg**. Yes, sir.

In looking at the number of claims filed after 1972, it is important to remember that many of those claims were claims that would have been filed under State law, so that it was not new claims; it was just being filed under a different process. There were the same numbers of claims.

Secondly, if you look at the numbers of claims generally in this country under workers' compensation over the last 10 years, you will find that there is an increase in workers' compensation claims, whether it is State or Federal or anything else. More people are becoming aware of their rights and are filing claims, as laws are improved to permit them to file claims.

Senator **Nickles**. As the laws are improved or as the benefits are improved?

Mr. **Elisburg**. Pardon?

Senator **Nickles**. As the laws are improved or as benefits are improved?

Mr. **Elisburg**. Both, both.

Senator **Nickles**. Do you believe, Mr. Elisburg, that there is a direct relationship between the increase in benefits and the increase in claims?

Mr. **Elisburg**. Well, I think when you had a $70 a week maximum, there were many people who chose to file lawsuits under unseaworthiness, for example, rather than file a claim under the Longshore Act. I think there were many cases where you simply could not get relief for an occupational disease case in this country, and people gave up. I think that is what happened.

Senator **Nickles**. There is one other topic that we did not discuss, but I would like to recognize my colleague, Senator John East, from the great State of North Carolina.

Senator East, we welcome you to these hearings. I know they are important to you and to your State. As you can probably tell from some of the past testimony and witnesses that we have had, the legislation is indeed important to anybody that has coverage by Longshore, and you do not have to be in an adjoining State. We find that Longshore is very prevalent in the State of Oklahoma. The inward effect of the Longshore is not just dockside, I guess.

Senator East, do you have any comments?

Senator EAST. Senator, I would simply like to thank you for holding these hearings. I am a cosponsor of your bill; I think it deals with a legitimate problem and need. I will not take an undue length of time here. I would like to enter a written statement into the record in support of your effort, commending you for it and commending you for the quality of hearings that you have had.

I regret that conflicts have not allowed me to be here more times than I have, but that seems to be an occupational hazard. But I did want you to know that I share your concern about this very important matter, and I congratulate you and commend you for undertaking the hearings.

Senator NICKLES. Thank you, Senator East, and we welcome you.

[The prepared statement of Senator East follows:]

PREPARED STATEMENT OF SENATOR EAST

Senator EAST. Mr. Chairman, I have a short statement to read into the record for today's hearings on S. 1182, a bill to amend the Longshoremen's and Harbor Worker's Compensation Act.

I would like to commend two courageous Senators. As former chairman of the Permanent Subcommittee on Investigations, Senator Sam Nunn has taken a leading role in exposing the shocking extent of organized crime's control over our waterfronts. We would not be here today reviewing this much-needed piece of legislation, absent the thorough groundwork laid by Senator Nunn and the Investigations Subcommittee during the past Congress.

Mr. Chairman, I would also like to take the time to commend you for your leadership in holding hearings on this legislation. We in America owe a debt of gratitude to the many honest union officials for the services they have performed in representing workers throughout our country. However, one of the basic fallacies of modern liberal dogma is the automatic equation of the institutional interests of unions with the interests of individual working men and women.

Who among us will deny that many unions today are big businesses? As a business, many unions are first and foremost concerned with paying union employees and increasing the power of the union as an entity. The potential to flood a particular employer with fraudulent insurance claims is a powerful weapon for a union in its collective bargaining wars. Extortion of kickbacks from employers unable to face the alternative of skyrocketing insurance premiums can add to the material well-being of union officials and labor racketeers. But to what extent do these tactics benefit the thousands of unemployed Americans who are out of work due to their employer's inability to pay high insurance premiums? To what extent is an employee benefited when he is forced by law to deal with sinister elements of organized crime as a condition of employment?

The answers to these questions and the need for legislative reform are equally obvious. I originally thought that repeal of the Longshoremen's and Harbor Worker's Act was the only answer to these perplexing problems. There is no good reason why longshoremen cannot be covered by the same state workmen's compensation laws as workers in other industrial areas. However, the constitutional authority of the Federal Government in maritime matters has persuaded me that S. 1182 is a reasonable solution to this tragic situation. S. 1182 eliminates the statutory presumptions that facilitate the filing of fraudulent claims and reforms the compensation schedules to still generous, but more economically reasonable, levels.

Mr. Chairman, I commend you for your leadership and ask that you add my name to S. 1182 as a cosponsor. I look forward to working with you on this bill and all future matters that come before this subcommittee.

Senator NICKLES. I had one additional question. I read the statements that were prepared, and one of them made some reference to the changes we were making as far as intoxication was concerned. Do any of you remember? I could dig it out.

Let me just put it like this. I may wish to submit additional questions for the record. Do any of you have any comments on that? We are making a change, striking out the word "solely," or something. Were you opposed to that change?

If you do not have it on the tip of your tongue, I do not want to belabor it because we have another panel and we need to move on.

Ms. ZWENIG. Well, we did point that out in our testimony, Senator, and we do see that as a step backward.

Senator NICKLES. On intoxication?

Ms. ZWENIG. Right. There are only four States that retain that phrase, "occasioned by intoxication." We submit that the sole causation requirement that is in the Longshore Act is reflected in six State statutes. If you would like us to go into more detail than that, we would be glad to provide the case histories for the States that have the Longshore Act language.

Senator NICKLES. We very much appreciate your testimony today, and I am very, very sincere when I say this—we do solicit your cooperation and counsel in hopefully working up, together, a system that is equitable and fair for all concerned. I am very serious when I say I would like to work together with you to see if we could not come up with a bill that would provide adequate and fair compensation for those concerned.

Thank you very much.

Mr. POWER. Thank you, Senator Nickles.

Senator NICKLES. Our third and final panel is Howard Bunn, vice president of the National Association of Independent Insurers; Robert Flockhart of the American Insurance Association, who is from New York; and Andre Maisonpierre, senior vice president, Alliance of American Insurers, Washington, D.C.

STATEMENT OF ANDRE MAISONPIERRE, SENIOR VICE PRESIDENT, ALLIANCE OF AMERICAN INSURERS, ACCOMPANIED BY ROY KALLOP, VICE PRESIDENT AND ACTUARY, NATIONAL COUNCIL ON COMPENSATION INSURANCE; ROBERT W. FLOCKHART, COUNSEL, AMERICAN INSURANCE ASSOCIATION; AND HOWARD BUNN, VICE PRESIDENT FOR WORKERS' COMPENSATION, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, A PANEL

Mr. MAISONPIERRE. Mr. Chairman, my name is Andre Maisonpierre. I am a senior vice president of the Alliance of American Insurers. I have requested that Mr. Roy Kallop, vice president and actuary of the National Council on Compensation Insurance, to be present with the panel and to provide some answers to any technical questions you may have on ratings.

Senator NICKLES. Roy Kallop?

Mr. MAISONPIERRE. Kallop, K-a-l-l-o-p. The National Council has filed a letter and a report with you indicating that, on average, the rates would decrease by about 22 percent if S. 1182 were to be enacted.

Senator NICKLES. Thank you.

Mr. MAISONPIERRE. Would you care for us to introduce ourselves?

Senator NICKLES. Please do.

Mr. FLOCKHART. Senator, I am Bob Flockhart of the American Insurance Association.

Mr. BUNN. My name is Howard Bunn, with the National Association of Independent Insurers.

Mr. MAISONPIERRE. Mr. Chairman, I would like to have the privilege of summarizing our statement.

Senator NICKLES. Please.

Mr. MAISONPIERRE. We appreciate very much the opportunity to testify. The alliance is a major association of property and casualty insurance companies. Our member companies write a substantial amount of workers' compensation as well as other property and casualty insurance coverages in all 50 States and the District of Columbia.

The plight of both the stevedoring and shipbuilding industries stemming from the 1972 amendments to the Longshoremen's Act was fully described last week. Your opening statement also graphically illustrated the diversion of cargo from American to foreign ports.

The fact is, Mr. Chairman, that the Longshore Act is slowly but surely choking these two industries to death. Sometimes, we seem to forget that the economic stability of this country is very much dependent on a healthy maritime industry, supported by viable port facilities. I wonder what would happen to Oklahoma, or North Carolina for that matter, if the ports of New Orleans and St. Louis were to close down for lack of loading and unloading facilities.

We applaud your avowed intent to bring S. 1182 out of committee before the August recess. The issues have been deliberated at length; now is the time for action.

From an insurance industry standpoint, the major impact of S. 1182 will be to remove the uncertainties of the present law which have made the act quasi-insurable. These uncertainties have been described by prior witnesses and are fully developed in our statement. The two major ones are the issues of jurisdiction and the indexing of benefits.

With respect to jurisdiction, S. 1182 provides the clearest answer we have seen to this vexing problem. True, one can conjure up hypothetical situations which would continue to create doubt as to whether State or Federal law should prevail.

We do not claim that when S. 1182 is enacted, there will no longer be any jurisdictional cases brought to the courts. No amendment to the Longshore Act can encompass all work situations. S. 1182 comes closest, except for a partial repeal of the act allowing all work accidents to be compensated under State work comp laws, but maintaining jurisdiction over the program by Federal courts.

That suggestion is not all that far-fetched. As was pointed out in the course of last week's hearings, the Longshore Act was enacted by Congress as a gap-filler following the Supreme Court decisions holding that State work comp laws could not be extended to cover accidents occurring over navigable waters. The intent was clear—to cover those workers who constitutionally could not be reached by State law.

A recent line of Supreme Court cases interpreting the Continental Shelf Act has led experts to believe that the Supreme Court today might very well reverse itself and find that State compensation laws can be made applicable to cover accidents occurring over navigable waters if the Federal courts continue to have jurisdiction. This would certainly resolve the jurisdictional problems.

The other uncertainty which arose from the 1972 amendments centers around the indexing of benefits. The unlimited indexing as presently required under the act makes it impossible for insurance carriers to arrive at appropriate insurance rates and premiums. It also makes it impossible for primary insurance carriers as well as self-insurers to secure adequate insurance coverage.

Unlimited indexing not only presents problems for insurers; it also constitutes an overkill. The purpose of indexing is to keep a certain relativity between benefits and spendable income. Since workers' compensation benefits are not taxed, applying an index factor equivalent to the increase in the national average weekly wage substantially improves the financial position of beneficiaries compared to that of the working population.

S. 1182 recognizes this inequity. It continues the indexing of benefits but limits it to a reasonable amount. The capping of benefits to 3 percent per year injects greater certainty into the benefit system. It will encourage carriers to reenter the marketplace.

Mr. Chairman, some comments were made last week with respect to the insurance mechanism which need to be rebutted. The first is that much of the high cost of the Longshore and Harbor Workers' Compensation program is the result of insurance company pricing.

Suggestions were made that both Congress and the Department of Labor investigate the pricing of insurance under the act. This is a red herring which has been waved time and again by organized labor. It is nothing but a diversionary tactic.

Some 3 years ago, the Department of Labor contracted with an actuarial consulting firm to study insurance pricing and availability under the Longshoremen's and Harbor Workers' Compensation

Act. DOL's consultant, Cooper & Co., gave the industry a clean bill of health. It also fully justified the industry's apprehension at insuring employers under the act. Not satisfied with these conclusions, DOL requested three additional consultants to comment on its consultant's findings. Again, the industry's pricing and marketing decisions were fully justified.

The other canard which needs to be addressed is that the insurance industry returns less than 60 percent of the premium collected in forms of benefits. This ratio bears no resemblance to actuality. It has been used by organized labor repeatedly in spite of the fact that time and again, labor has been provided with hard data disputing its validity.

A look at data from the National Council on Compensation Insurance for 1978—the most current year for which a breakdown is available—shows that for every dollar paid by employers, private insurers spend an estimated 83.6 cents for losses and loss adjustment expenses; 5.8 cents for dividends to policyholders; 3.8 cents for State taxes; 5.3 cents for general company expenses, including loss control services; and 7.5 cents for company sales costs and commissions in sales. Mr. Chairman, this is a far cry from the allegations made last week by those who have characterized S. 1182 in the course of these hearings as regressive have failed to look at the bill in conjunction with the present law which it amends. When examined in this context, the Longshore Act will continue to be the most liberal workers' compensation law in this country.

We look upon S. 1182 as the completion of the task begun by Congress in 1972 in the reform of the Longshoremen's and Harbor Workers' Compensation Act. The first shoe was dropped 9 years ago when Congress liberalized a benefits program which had been allowed to lag and which was no longer responsive to the needs of injured workers. Today, you are about to drop the other shoe. S. 1182 is an excellent instrument for reform and we urge its prompt enactment.

Thank you very much.

[The prepared statement of Mr. Maisonpierre follows:]

STATEMENT OF THE ALLIANCE OF AMERICAN INDUSTRIES

HIGHLIGHTS OF ALLIANCE STATEMENT

1. The Alliance strongly endorses S.1182. It will correct the imbalance arising from the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, combining a most generous workers' compensation plan with controlled costs. (Page 1)

2. S.1182 completes the legislative action which should have been taken in 1972. The measure will insure that benefits under the Longshore Act are directed only to those entitled to receive them. It will also remove the many uncertainties which have forced most private insurers to withdraw from voluntarily writing Longshore coverage. (Page 2)

3. S.1182 will remedy the morass of jurisdictional confusion existing under the Longshore Act, assuring consistent treatment of both employees and employers engaged in waterfront activities. (Pages 3,4)

4. Considerably greater certainty also will be injected into the law by the provision in S.1182 limiting annual increases in the maximum weekly benefit level to a steady and reasonable amount. (Page 5)

5. From an insurance standpoint, the most significant reforms under S.1182 include controls to assure the quality of medical care provided to injured employees, the formula limiting benefits to 80 percent of the employee's net spendable earnings, safeguards against misuse of the "second injury fund" which provides compensation in certain cases involving pre-existing disability, and authorization of settlements in death cases. (Pages 7-9)

6. The Alliance has only a few recommended changes in S.1182 -- limiting any award given in cases involving pre-existing disability to the disability arising from the work accident, for instance, and continuing the existing schedule of payments for occupational hearing loss. (Pages 9-11)

7. We support coordination of benefits available under the Longshore Act with other disability benefits and recommend that S.1182 make Longshore benefits primary. Such action would correspond to steps being taken in Congress to prevent states from reducing workers' compensation benefits available to an employee by Social Security disability benefits paid or payable. (Pages 11,12)

8. The Longshore issue is not new. Problems with the Act have been well identified during both House and Senate hearings over the past several years. S.1182 is an excellent instrument for reform. It should be enacted promptly. (Page 12)

My name is Andre Maisonpierre. I am a Senior Vice President of the Alliance of American Insurers. The Alliance is a major association of property and casualty insurance companies. Our member companies provide workers' compensation and property and casualty insurance coverages in all 50 states and the District of Columbia.

INTRODUCTION

Mr. Chairman, we strongly endorse S.1182. The legislation will correct the imbalance arising from the amendments enacted to the Longshoremen's and Harbor Workers' Compensation Act in 1972.

Had the provisions of S.1182 been incorporated in those 1972 amendments to the Act, the result would have been a most generous workers' compensation plan combined with controlled costs. Insurance would have been readily available. These hearings would not have been necessary.

Today's problems with the Longshoremen's and Harbor Workers' Compensation program should be of no surprise to anyone. The foundation for trouble was built into the 1972 amendments. Anyone with a rudimentary knowledge of workers' compensation could have foreseen the future. Many did but Congress did not listen.

Few people in 1972 questioned the need to upgrade benefits under this federal workers' compensation Act. The Alliance, among others, strongly supported such liberalization. The Act had been allowed to lag and was no longer fulfilling the legitimate objectives of a compensation program -- payment of adequate benefits as wage replacement to allow an injured person to live with self-respect.

The Alliance's strong support for upgrading this law in 1972, however, was conditional on a number of reform proposals which would have insured that benefits would have been paid only to those legitimately entitled to receive them.

Unfortunately, Mr. Chairman, none of these proposals were adopted. In fact, new abuse potentials were enacted into law.

S.1182 completes the legislative action which should have been taken by Congress in 1972. Those who have opposed S.1182 in the course of these hearings and have characterized the legislation as "regressive" have failed to look at the bill in conjunction with the present law. When examined in this context, the present law, as amended by S.1182, will:

- Continue the Longshoremen's and Harbor Workers' Compensation Act as the most liberal workers' compensation law in this country.
- Insure that the very high benefits paid under the Act are directed to those who are meant by Congress to be compensated for work-related injuries.
- Restore sense and stability.
- Remove the many uncertainties presently existing under the Act -- uncertainties which have forced most private insurers to withdraw from voluntarily writing this line of insurance coverage.

S.1182 AND INSURANCE AVAILABILITY

Since the Longshoremen's and Harbor Workers' Compensation Act was amended in 1972, the Alliance has been privileged to testify three times before Congressional committees holding oversight hearings on this federal program. Our position can be summarized by the following statement taken from our September 16, 1980, testimony before the Senate Committee on Labor and Human Resources.

> "While the Act is in need of a complete overhaul, no improvements from an insurance standpoint will do any good unless the reform addresses the two issues of coverages and benefits."

Mr. Chairman, S.1182 addresses these two issues.

JURISDICTION

The present jurisdictional morass of the Act results directly from the combination of the 1972 Congressional amendments, which substantially broadened jurisdiction, and administrative decisions.

The legislative expansion brought many land operations under this federal law. Included among these operations are "adjoining piers, wharfs, terminals, building ways, marina railways and other adjoining areas customarily used by an employer in loading, unloading, repairing or building a vessel."

In turn, the Department of Labor, through administrative action, has sought to incorporate under coverage all boatyard and marina employees, whether they are injured on navigable waters or on land.

The extent to which the 1972 amendments in combination with the Department of Labor's interpretation of these amendments has increased the jurisdiction of the Act is anyone's guess. There is no boundary separating states from federal jurisdiction. As a result, an unusually large number of cases have had to be litigated before the federal courts. To this day, no one has any clearer picture of jurisdiction than the one which existed nine years ago when the amendments were enacted.

From an insurance standpoint, it is impossible to ascertain which employees or employments are covered by the federal law as opposed to a state law. Accordingly, there is no way for an insurance carrier to know which rate to charge -- a rate commensurate with state workers' compensation exposure or a rate applicable to the federal exposure.

This dilemma was fully recognized by a consultant to the Department of Labor, Cooper and Company. In a report released to Congress December 3, 1979, the company graphically describes the impossible situations in which insurers have been placed as a result of the amendments to the Act in 1972 and the compounding effect of the interpretation of these amendments by the Department of Labor.

On the other hand, S.1182 is very clear as to which employments are covered, who "employees" are under the Act, and exactly where the Act's jurisdiction terminates. S.1182 takes into consideration the unique nature of waterfront employment and adopts a practical stand which assures consistent treatment of both employees and employers engaged in waterfront activities.

This consistency should encourage private insurers to return to the marketplace and voluntarily seek out business under this federal law.

BENEFITS

Our problems with benefits today are multitudinous.

In the first place, insurers cannot live with the unlimited indexing of benefits. In prior testimony before Congress we illustrated the effect which indexing has on benefits. Unlimited indexing makes it impossible for insurance carriers to arrive at appropriate insurance rates and premiums. It also makes it impossible for primary insurance carriers to secure adequate reinsurance coverage.

Unlimited indexing not only presents problems for insurers; it also constitutes gross overkill. The purpose of indexing is to try to keep a certain relativity between benefits and spendable income. Since workers' compensation benefits are not taxed, applying an index factor equivalent to the increase in the national average weekly wage substantially improves the financial position of beneficiaries compared to that of the working population.

S.1182 recognizes this inequity. It continues the indexing of benefits but limits it to a reasonable amount. It recognizes, indirectly, that wage and salary increases are subject to federal, state and Social Security taxes, while benefit increases are free of taxation.

By capping the benefit index to three percent per year, a considerably greater degree of certainty is injected into the benefit system. This, too, will encourage insurance carriers to re-enter the marketplace.

S.1182 addresses other benefit problems which we have identified in previous testimony:

- It re-establishes the maximum weekly benefit level which may be payable to survivors. This weekly cap was removed from the Longshoremen's and Harbor Workers' Compensation Act in 1972. We believe that this came about through a drafting error. It is high time for that to be corrected.
- S.1182 eliminates the provision of the Act requiring that benefits be paid to survivors of permanently disabled beneficiaries who die from causes totally unrelated to their accident or their work.

The present Act provides that life insurance benefits be paid to survivors of all employees who have been declared permanently disabled. It is an unheard-of approach under workers' compensation. It shows a total disregard for the need to husband benefit dollars carefully. Excesses such as this are what has forced the Longshoremen's and Harbor Workers' Compensation Act to cost levels unaffordable to business.

- S.1182 redefines the formula to be used as the basis for the determination of benefits to be paid under the Act. Under the present law, all wages are to be considered in determining benefits, whether the wages are earned in the covered employment or elsewhere. As a result, it is quite possible for an employee to receive in benefits considerably more than the wages earned in covered employment. S.1182 repeals the authority to include an employee's moonlighting wages as part of the pre-accident wages used to determine benefits under the Act.

OTHER MAJOR REFORMS CONTAINED IN S.1182

Mr. Chairman, S.1182 is obviously the result of careful analysis and consideration of the record established during the many oversight hearings which have been held before Congress over the past several years. The legislation addresses all of the legitimate problems which have been identified by the many witnesses who have appeared before both House and Senate committees.

Some of the reform proposals will have a major impact in controlling the cost of the system by insuring that payment of benefits shall be limited to those actually disabled from work accidents and deprived of wages as a result of such accidents. The reform proposals will also substantially enhance the quality of medical care provided under the Act and will encourage greater use of rehabilitation. Further, S.1182 addresses the many administrative deficiencies which have been identified in prior testimony and establishes clear criteria to insure that administration of the Act by the Department of Labor is consistent from region to region.

From an insurance standpoint, the following reforms provided by S.1182 are the most significant:

- The present law provides that an employee may select his or her own attending physician. There are few, if any, controls over the quality of care available to injured employees. S.1182 limits the employee's selection to physicians who are approved by the Deputy Commissioner and who are qualified to treat traumatic injuries. It also places important requirements on physicians to make reports. It establishes criteria for the evaluation of permanent impairment. It expands the use of impartial medical panels. Supervision of medical care is transferred from the Secretary of Labor to the Deputy Commissioner, who is much closer to the scene and who can insure that the best care is provided to injured employees.
- Present law provides that benefits shall be 66-2/3 of an employee's average weekly wages. S.1182 replaces this formula, limiting benefits to 80% of the injured employee's net spendable earnings. This provision recognizes the tax-free nature of benefits and agrees with a key proposal under recommendations of the National Commission on State Workers' Compensation Laws published in 1972.

- The present law follows the pattern of many state compensation laws in providing a "second" or "subsequent" injury fund to pay for benefits to injured employees whose permanent disability arising from a covered accident may be considerably greater because the employee had a pre-existing disability. The purpose of this provision is to insure that employers who knowingly hire handicapped persons will not be penalized if the handicapped person is injured in the course of employment and if the work-related disability creates a permanent disability which, when combined with the known pre-existing condition, creates a disability greater than that which would have resulted from the injury alone.

The concept is sound but under the present law there have been serious abuses in the use of this Fund by both employers and insurers. The Department of Labor makes no attempt to protect the Fund. Unfortunately under the circumstances both self-insured employers and insurance carriers have made excessive demands on it. S.1182 provides for a committee to protect the Fund from the many abuses which have been identified in prior testimony. We believe that this section is highly desirable. The financial obligations which have been incurred by the Fund to date are unfunded and these liabilities will create a major burden on the system in years to come. It is essential that the abuses be controlled. S.1182 provides a mechanism to accomplish control.

- Under the present law, an individual who sustains a "non-scheduled" permanent disability and is found to have a loss of "wage earning capacity" may still receive substantial benefit payments even though no loss of income has been incurred. S.1182 will insure that such abuses no longer occur. It limits payment of benefits for "non-scheduled disabilities" to situations involving actual wage loss. No payments are to be made when no wage loss has occurred.
- Even though settlement of claims is recognized by the medical profession as psychologically desirable to enhance a cure, the Department of Labor has thrown a great many obstacles in the path of settlements since the Act was amended in 1972. Furthermore, Deputy Commissioners have no authority to approve settlement of fatality claims. S.1182 eases the settlement procedure considerably and authorizes settlement in death cases.
- S.1182 deals with many of the administrative problems which have been identified in prior testimony. Powers of the Deputy Commissioner are better defined. They are granted more flexibility and independence from the Department of Labor. Also, quasi-judicial functions are transferred from the Department of Labor to those for whom the responsbility is more appropriate: the Benefits Review Board and the body of Administrative Law Judges. S.1182 will greatly enhance efficient administration of the Act.

CONCERN WITH S.1182

Mr. Chairman, the preceeding section describes some of the reforms of the present Act which S.1182 seeks to achieve. S.1182, however, contains a few provisions which are giving us certain concern.

- Section 5(e)(2)(B) is quite worrisome. It provides that, if a physician conducting an independent medical examination concludes that the injured person's permanent physical impairment or disability existing at the time of the examination is not due solely to the relevent work accident but is greater because of the existence of a pre-existing physical impairment, the employer shall be entitled to relief under the second or subsequent injury fund created under section 8(f) of the Act. We have already alluded to the massive debt which has been incurred by that fund. Most workers' compensation experts agree that, since such funds were created as an incentive for employers to hire handicapped people, their use should be limited only to relieving employers of potential workers' compensation benefit payments related to the known pre-existing disability. Section 5(e)(2)(B) goes considerably beyond this intent. If this section is allowed to stand, it will increase the financial burden on the fund considerably.

  We believe that, if an impartial medical examination determines that a certain portion of an employee's disability is the result of a condition which pre-existed the industrial accident, any award under the Act should be limited to the disability arising from the accident. We suggest that this section be amended accordingly.

- Section 6(b)(2) establishes criteria for determining compensability resulting from occupational loss of hearing. We support these criteria. We believe that they are sound and are based on current accepted medical concepts. However, it seems that the number of weeks of disability to be paid for hearing loss has been inadvertently omitted. We suggest that the existing schedule be continued -- 52 weeks of disability for total loss of hearing in one ear and 200 weeks of disability for total hearing loss in both ears.

- We are concerned that adding the spine as "a body member" subject to schedule under section 8(c) of the Act will create a great deal of unnecessary litigation. Determining loss of use of the spine is a most difficult task. Limitations in flexions, extension, rotation, etc., can be measured with relative accuracy if they occur in one of the limbs of the body. Such determinations are not possible with respect to the spine. Thus, we would urge that section 6 of S.1182 be amended by striking (3) and that (4) be redesigned as subsection 8(c)(21).
- Section 9(f)of S.1182 coordinates workers' compensation benefits with other available benefits payable to an injured employee. We believe that coordination of benefits is important and necessary to insure that overcompensation does not occur. We would suggest, however, that S.1182 be amended to make workers' compensation benefits primary in relation to disability insurance benefits payable under the Social Security Act.

  Presently, beneficiaries entitled to both workers' compensation and Social Security disability benefits are entitled to receive in benefits from both systems only 80% of their pre-accident wages. If combined benefits are in excess of that amount, Social Security benefits are reduced.

The Congressional tax writing committees, the Senate Finance and House

Ways and Means Committees, are in the process of restructuring this provision of the Social Security law. Also, both Committees appear to be supporting an Administration position which would prohibit states from reducing workers' compensation benefits by Social Security disability benefits paid or payable.

We support the approach taken by the Administration and the tax committees. Workers' compensation benefits should be internalized in order to enhance the safety objective of the workers' compensation system. Furthermore, Social Security funds are limited and should not be used to support specific benefit systems such as workers' compensation. We recommend that this section be amended to bring it in conformity with the pending action of other Congressional committees.

CONCLUSION

Mr. Chairman, it is seldom that newspapers with such different editorial views as those of the Wall Street Journal and the New York Times can agree on a public policy issue. Both newspapers, as well as others, have strongly editorialized in support of reforming the Longshoremen's and Harbor Workers' Compensation Act. The issue is not new to Congress. Extensive hearings have been held in both the House and the Senate during the past several years. The problems with the Act have all been well identified. Congress should have acted many years ago. S.1182 is an excellent instrument for reform and we urge its prompt enactment.

Alliance

Andre Maisonpierre
Senior Vice President

Alliance of American Insurers
1110 Vermont Avenue, N.W.
Washington, D.C. 20005
202·822·8811

SENATOR
[illegible], N.J.
19[illegible] SEP 16 AM 10 44

September 14, 1981

The Honorable Harrison A. Williams, Jr.
United States Senate
Washington, D. C. 20510

Dear Senator Williams:

We submit the following answers to the questions which you raised in your letter to us of August 7, 1981.

1. Does the Alliance of American Insurers oppose or endorse the position of the stevedoring and shipbuilding industry regarding the offset of compensation benefits in those instances where social security benefits are also received? Explain the reasons for your position.

Ans. The Alliance stated its position with respect to the coordination of social security disability benefits and workers' compensation in the course of its oral presentation before the Labor Subcommittee on June 23, 1981 (see beginning page 91 of transcript). At that time the Alliance urged that S.1182 be amended so as to continue the present benefit coordination program between workers' compensation and the social security disability system. In other words, the Alliance favors the position that social security disability benefits should be excess to workers' compensation.

We believe that it is essential that when payments are due from a variety of government and private sources benefits need to be coordinated to avoid excessive payments.

2. Explain why the internalization of the cost of work injuries is a preferable policy to utilization of offsets against other benefits programs.

Ans. The internalization of benefits is a desirable objective to be pursued by both government and private industry. There are, at times, conflicts with respect to which benefit system should be charged with the cost of benefits paid to a beneficiary when the beneficiary is entitled to benefits from multiple sources. As a general rule, the Alliance believes that the benefits should be charged to that system which is most responsive to the status of the beneficiary. For instance, if a beneficiary is totally disabled and entitled to both workers' compensation and social security disability benefits, workers' compensation should be primary. On the other hand, if the individual has retired from the labor force and

Working to Make Insurance Work Better

and is no longer entitled to social security disability benefits, there may well be good reasons why social security retirement benefit program should be primary. The same would apply when there exists a conflict between workers' compensation and private retirement benefits programs. Obviously, if an individual is capable of working but is unable to find employment because of a difficult labor market and such a person is entitled to both workers' compensation and unemployment insurance benefits, a good case could be made that the unemployment insurance benefits should be primary since the inability to secure employment is due to the dislocation of the labor market.

3. Explain why utilization of the offset program incorporated in S.1182 and supported by industry would interfere with or reduce incentive for workplace safety.

Ans. As mentioned above, the Alliance urged that the offset program incorporated in S.1182 be amended with respect to the relationship between the social security disability program and workers' compensation. With respect to the incentive for workplace safety, we would agree that generally speaking the greater the potential cost to employer resulting from work accidents the greater the safety incentive. However, similar internalization arguments can be advanced in support of the primacy of other competing benefit programs. For instance, employment stability has a leveling affect on the cost of unemployment insurance. The greater the cost of unemployment insurance, the greater the incentive on employers to insure the stability of employment.

4. Assume that the increases in wage, exclusive of fringe benefits, in the stevedoring industry has amounted to 102 percent since 1972. In light of the assumption, explain how a 73 percent increase in section 10f adjustments under the Longshoremen's Act would represent a substantial improvement in the position of beneficiaries compared to that of the working population. In formulating your answer, account for the following factors -- the loss of wage earnings and permanent total disability and death cases, the loss of potential pension and/or retirement income, the loss of health insurance and related medical benefits and the rate of inflation since 1972.

Ans. The objective of section 10f is to maintain the benefit levels' purchasing power. Hence, increases in wage scales in the stevedoring industry is totally irrelevant.

As to fringe benefit losses, an examination of the ILA master contract clearly shows that a longshoreman injured on the job continues to have available many of the fringe benefits he had prior to the accident.

5. Under the proposed legislation, S.1182, the safety provisions in current section 41 of the Longshoremen's Act will be eliminated. OSHA inspections will also be reduced from previous levels. Under these conditions, explain how employers will have incentive to provide a safe workplace.

Ans. We do not read S.1182 as diminishing the government responsibilities to insure safe working conditions along the waterfront. We believe that as long as the federal government supports an occupational safety and health administration all of the government's responsibilities should be centered within that administration. the fragmentation of the federal government's safety responsibilities is both wasteful and inefficient.

6. State the reasons, if any, that the Alliance opposes competitive pricing as a substitute for adherence to rates set by state rating bureaus in the workers' compensation line.

Ans. Rating bureaus do not set rates. Rates are set by state insurance commissioners. Furthermore, the Alliance does not and never has supported "adherence to rates." The Alliance supports the present administered pricing system which allows for individual company rate deviations as well as the payment of dividends.

7. Does the Alliance oppose inclusion of investment income in the ratemaking process? If so, state the reasons thereof.

Ans. The question is academic since investment income is considered in the ratemaking process. The attached paper prepared by the National Council on Compensation Insurance explains in great detail how investment income is considered in workers' compensation insurance ratemaking. (Attachment I)

8. In your view, does the setting of premium rates by rating bureaus amount to cartel pricing?

Ans. No.

9. State your opinion of the model competitive rating bureau adopted by the National Association of Insurance Commissioners. Supply the reasons supporting your view.

Ans. The Alliance does not support those sections of the NAIC Model Bill dealing with workers' compensation. The reasons for such views are fully detailed in the attached statement of Gary Countryman, President, Liberty Mutual Insurance Company before a NAIC subcommittee, October 20, 1980. (Attachment II)

10. In the course of your testimony you expressed the view that due to the section 20 presumption, Administrative Law Judges, the Department of Labor, and the courts disregard the facts of the cases and rule solely on the basis of the presumption. Cite the cases that support your view.

Ans. We anticipate that the Supreme Court of the United States will address section 20 when it decides the case of U.S. Industries/Federal Sheet Metal et al. v. Director OWCP et al. case number 80-518.

Sincerely,

Andre Maisonpierre

AM:lbd
Attachments 2

(Note: In the interest of economy, the attachments referred to (Attachment #I: Restatement of the Consideration of Investment Income in Workers' Compensation Insurance Ratemaking, December 1, 1978; and Attachment II: Statement of Gary Countryman of the Liberty Mutual Insurance Co. before the NAIC Subcommittee on Competition in Hartford, Conn., on October 20, 1980) were retained in the files of the Committee where they may be researched upon request.)

Senator NICKLES. Thank you.

Am I correct that the rest of you gentlemen are just going to help answer questions, or did you have some opening comments that you wanted to make?

Mr. FLOCKHART. I think we would like to make some opening comments, if it is all right with you, Senator.

Senator NICKLES. Well, let us try to——

Mr. FLOCKHART. I am not going to read my statement; it is part of the record.

Senator NICKLES. Thank you.

Mr. FLOCKHART. The American Insurance Association and our member companies are writing about 45 to 50 percent of all the workers' compensation insurance in the country, and we are writing a significant amount of longshoremen coverage.

We are greatly concerned with the condition that we find the Longshore Act in today since the 1972 amendments. In short, we believe the Longshore Act has gotten off the track and lost sight of the fundamentals of what workers' compensation insurance is all about, which is wage replacement.

We have in our statement the various areas, such as the unrelated death benefits, and no cap on benefits for death cases. We are concerned with the jurisdiction which, 10 years after the 1972 amendments, is still a big quagmire and a foggy area.

One thing that apparently is a matter of concern and, perhaps at first glance, looks like it is a serious cutback is the cap that is being placed on cost of living adjustments. First of all, we applaud this approach. The escalation of benefits is nothing more or less than an institutionalizing of inflation, and that approach to problems must be addressed.

The simple fact, however, is that by putting a cap on escalation, it does not preclude this Congress or future Congresses from addressing the problem if inflation continues and if benefits become, in fact, seriously out of date. You can always come back and say, "We are going to update those benefits." That is how most pension plans throughout the country, in fact, function.

A benefit program is established today in light of the facts today. If those benefits become outdated because of inflation or other factors, you come back and you address that issue in light of the facts presently there.

We see indexing of benefits as a means of trying to address future problems which we do not know about and, as I said before, institutionalizing inflation.

As I said, I did not want to go through my whole statement, Senator. I am sure it will be made a part of the record. Thank you.

[The prepared statement of Mr. Flockhart follows:]

STATEMENT OF
AMERICAN INSURANCE ASSOCIATION
BEFORE THE
LABOR SUBCOMMITTEE
OF THE
SENATE LABOR AND HUMAN RESOURCES COMMITTEE

JUNE 23, 1981

My name is Robert W. Flockhart. I am Counsel with the American Insurance Association, an organization comprised of 152 property and casualty insurance companies. Our member companies provide approximately fifty percent of all the workers' compensation insurance written throughout the country, naturally they provide a significant amount of the coverage under the Longshoremen's and Harbor Workers' Compensation Act. Accordingly, we greatly appreciate this opportunity to present our views at these hearings on the Longshoremen's and Harbor Workers' Compensation Act and Senate 1182.

We believe that this Subcommittee has S 1182 under active consideration as a result of the fact that the Longshoremen's and Harbor Workers' Compensation Act, as written and as it is being interrupted by those charged with its administration and enforcement, is in sad disarray. This Act is a federal workers' compensation law. Such laws are intended to provide medical care for injured employees, and reasonable wage replacement for such employees and in cases of death reasonable wage replacement for surviving dependents. The present system has clearly lost sight of these fundamentals. Today money is being distributed in the name of benefits under this Act, which are excessive and which are being paid to individuals for reasons that go far beyond reasonable wage replacement for injury or death arising out of and in the course of employment. As a result the cost of this social insurance program has increased sharply, and to many employers now being included within the scope of this Act, the cost has become prohibitive. Only legislation such as S 1182, can get the program back on the track--can set it on the course originally intended by Congress when the law was enacted-- and bring the cost of the program into acceptable range.

While putting the program back into proper prospective, this bill in no way short changes the severely injured employee or surviving dependents. This is fully consistent with our Association's philosphy that workers' compensation can pay adequate, indeed significant benefit levels and still maintain the cost of the system within acceptable bounds. Therefore, our Association strongly endorses the efforts of the Subcommittee to obtain these ends.

In this regard we would like to point out some of the serious and costly features of the current law and how S 1182 addressed these issues.

MAXIMUM WEEKLY BENEFITS FOR DEATH CASES

It has been held by the United States Supreme Court that there is no maximum weekly benefit in death cases under the Longshoremen's Act as there is in the case of disability benefits. We believe, as did the, Third and D. C. Courts of Appeals when they reviewed this issue, that the Congress intended to keep maximum weekly death benefits at the same level as in cases of disability, i. e., 200% of the average national wage.

The maximum weekly benefit for death and disability was unquestionably the same prior to the 1972 amendments. There is no indication in the record of the proceedings at the time the 1972 amendments were under consideration that the Congress intended to change this situation. Maximum weekly benefits of one amount of another exist in every state's workers' compensation law. This is a recognized and appropriate way of balancing benefits and costs--the rights of employers and employees. S 1182 will establish a maximum weekly benefit for death cases equal to that applicable in disability cases.

DEATH BENEFITS FROM NON-OCCUPATIONAL CAUSES

As a result of the 1972 amendments when a permanently, totally disabled worker dies the survivors are entitled to death benefits regardless of the cause of death. The workers' compensation system is intended to provide benefits for death or injury arising out of and in the course of employment. This fundamental concept has been lost and, in effect, a life insurance program has been worked into the workers' compensation system. We believe this is an undesirable and unnecessary expansion of the workers' compensation system. If this system is to provide high benefit levels to seriously injured workers or their survivors, as it should, we must recognize and accept reasonable limitations on the system. S 1182 accepts these realities and eliminates this non-work related benefit from the system.

JURISDICTION

When the Longshoremen's Act was initially adopted it was to fill a void resulting from court decisions which held that the states' workers' compensation systems were not applicable to injuries or death occurring on the navigable waters of the United States. The 1972 amendments greatly expanded the jursidiction of this Act beyond the so-called water's edge. Nearly 10 years after the adoption of the 1972 amendments, it is still extremely unclear just where the Longshoremen's Act exposure starts and ends. The U. S. Supreme Court's decision in the Northeast Marine Terminal, Inc. v. Caputo case provided some clarification with regard to stevedoring operations. Never the less, there is still a large degree of uncertainty for both stevedoring operations as well as other types of operations, especially recreational boat building and marinas. The latter type of operations are usually small operations and it is hard to believe that anyone envisioned such operations coming within the scope of the Longshoremen's Act when it was originally enacted in the 1920's. S 1182 addressed this serious issue by establishing standards regarding the scope of coverage of the Act which will eliminate a great deal of the current confusion and limit the scope of coverage to the type of exposures it was originally intended to encompass.

COST-OF-LIVING ADJUSTMENTS

Presently disability and death benefits are adjusted annually to reflect any increase in the average national wage. To comment on the obvious, we are living in a period of high inflation, including double-digit inflation. It is not at all uncommon in permanent total disability or death cases to pay benefits for 15 or 25 years. This annual adjustment of benefits results in individual cases costing millions of dollars. Neither the industry, nor anyone else has the means of predicting what the inflationary trend will be over such a long period of time. When a case occurs a reserve is established to provide money to make future payments. Yet how can a company fix a reserve without any knowledge of what the rate of inflation during the next 10, 20 or 30 years will be? This feature of the law creates

Accordingly, to provide more certainty in this Act and contain costs, S 1182 places a cap on the annual adjustment. We do not believe that this denies an injured worker or his survivors reasonable compensation. Workers' compensation benefits are to replace lost wages. Obviously, an employee's wages do not increase annually with the cost-of-living over a 40 year or so life span spent in employment. Accordingly, placing a limit on these annual adjustments creates a more realistic situation and will still result in providing fair compensation. Furthermore, should this cap prove to be unreasonably low after a period of time the Congress can always review the problem and mandate benefit adjustment to provide realistic benefits in light of the facts that prevail at that time. This is a normal procedure for adjusting benefits to reflect inflation in a great majority of pension plans. Furthermore, from the viewpoint of the economy as a whole, this is a most important step. Indexing benefits can be a form of institutionalizing inflation. By rejecting that concept, whether now when reviewing Longshoremen's Act benefits or when any other benefit program is under review, can only serve the best interests of the system and the economy as a whole.

ADMINISTRATION

Prior to the 1972 amendments Deputy Commissioners heard cases arising under the Act and made decisions on the facts presented. In the event of disagreement with the deputy commissioner's decision an appeal was taken to the District Court. Needless to say, since the deputy commissioner only handled claims under the Longshoremen's Act they acquired a certain degree of expertise in this area. Considering the fact that a large number of cases involve techincal medical testimony and a thorough knowledge of this specific law, this expertise is most desirable for proper administration of the system. The 1972 amendments provided for the deputy commissioners to hold informal hearings only. S 1182 would return considerable claims handling authority to the deputy commissioners. It would also establish the Board of Review, which would handle appeals from the deputy commissioner's level, as an independent body, appointed by the President with the advise and consent of the Senate. We believe this restructuring of the Administration will prove most beneficial to all parties and will restore a much greater degree of impartiality in handling Longshoremen's Act cases.

COORDINATION WITH SOCIAL SECURITY BENEFITS

S1182 would terminate temporary total and non schedule permanent partial disability benefits at age 65. As I said at the outset, a workers' compensation system is a wage replacement system. Accordingly, terminating benefits for those presumably no longer in the work force is appropriate. On the other hand, this bill would also reduce benefits by social security disability benefits. We understand that the issue will be reconsidered by the subcommittee. Accordingly, I will not dwell on it at this time, except to note our opposition to this feature of the bill.

As I indicated this statement is intended to point out some of the problems in the present system and to comment on some of the proposed solutions. It is not intended as a comprehensive or technical review of S 1182. As in the past, the Association stands ready to provide whatever assistance, technical or otherwise, you and your staff may feel desirable in your further consideration of the Longshoremen's and Harbor Workers' Compensation Act.

I thank you for this opportunity to allow me to present to you the views of the American Insurance Association.

Respectfully yours,

Robert W Flockhart

Robert W. Flockhart, Counsel
AMERICAN INSURANCE ASSOCIATION

Senator **Nickles**. Thank you.

Mr. Bunn, did you have a——

Mr. **Bunn**. Yes. I would like to make a brief statement, too, if I may.

My name is Howard Bunn and I am with the National Association of Independent Insurers. The NAII supports the general thrust of the bill. We think that there are several areas that need to be addressed.

I happen to be from North Carolina, Senator East's home State, and was former head of the workers' compensation board in that State. During the administration of President Ford, I directed the Presidential Task Force on Workers' Compensation, which succeeded the national commission that you have referred to.

The NAII as a trade association of insurance companies basically is concerned about several key areas of the act. One is jurisdiction. We think that from an insurance perspective, it is very difficult to know what the limits of your risk are when the act is drawn the way it is right now, and we think some clarification as suggested by the bill is along the lines that is needed in order to make it an insurable program.

We think, as Mr. Flockhart mentioned, that the benefits escalation provision is a provision, as it is currently written, which takes on basically an inflationary spiral of its own; it just adds another layer of inflation to it. We cannot quarrel with the need for some type of provision, and we think something along the lines that you have suggested is in the ballpark of what needs to be done.

The unrelated death benefits section is nothing more than a life insurance provision, and to the best of my knowledge, there is no workers' compensation act that has anything like that, and it needs to be taken out. The number of cases that come into the act as some other parts of the program have—I think it is just a provision that has no place in a workers' compensation bill.

There are a number of other provisions that we have outlined in our statement, but essentially we support the thrust of the bill and commend you for your efforts.

I would be glad to answer any questions you might have.

[The prepared statement of Mr. Bunn follows:]

STATEMENT OF THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS BEFORE THE SENATE LABOR SUBCOMMITTEE OF THE COMMITTEE ON LABOR AND HUMAN RESOURCES IN RE S. 1182, A PROPOSAL TO AMEND AND REVISE THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

JUNE 23, 1981

Chairman Nickles and members of the Senate Labor Subcommittee of the Committee on Labor and Human Resources, the National Association of Independent Insurers supports the intent and direction of Senate Bill 1182. The proposal addresses the following areas of needed revision in the Longshoremen's and Harbor Workers' Compensation Act:

* Jurisdiction
* Benefits Escalation
* Unrelated Death Benefits
* Weekly Benefits - Death Cases
* Permanent Partial Disability
* Administration
* Medical

My name is Howard Bunn, Vice President for Workers' Compensation, National Association of Independent Insurers (NAII). Thank you for the opportunity to present our comments on Senate Bill 1182.

The NAII is a property/casualty insurance trade association comprised of over 500 member companies. Our membership consists of both the very large carriers, e.g. Allstate and Nationwide and other companies of varying sizes. In the field of workers' compensation our premium volume represents approximately fifteen percent of the insurance market. One of our member companies, Midland Insurance Company (Midland presented testimony to this Committee last week through its vice president, James F. Hughes), writes a considerable amount of premium volume pursuant to the Longshore and Harbor Workers' Act (hereinafter referred to as "the Act").

The 1972 amendment to the Act have resulted in a workers' compensation law characterized by uncertainty, lact of predictability and exceptionally high costs. The areas of difficulty which the bill speaks to through its various proposals are as follows:

JURISDICTION

Before passage of the 1972 amendments, the concept of "water's edge" clearly prevailed. Employees who worked seaward of the water's edge were covered under the Act. Those landward were covered under the applicable state system. The 1972 amendment entended the coverage landward but left doubts about how far and to whom.

No one today can say with assurance where Longshore coverage ends and where state worker's compensation jurisdiction begins. This has encouraged employees to "migrate" from state programs if there is the possibility of qualifying for the higher Longshore benefits. It has also created extensive litigation and caused all reviewing courts to complain about the lack of clarity in the amendments and their legislative history.

Sections 2 and 3 of S. 1182 do much to return the Act to what we believe was its original purpose, specifically to cover longshoremen " ... engaging in the loading or unloading of cargo between vessels upon the navigable waters of the United States and to point of rest." The return to this doctrine along with other clarifying language creates certainty of risk for underwriters to deal with.

BENEFITS ESCALATION

Section 10 (f) of the Act mandates that on October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after the date of enactment of this subsection shall be adjusted annually based on increases in the national average weekly wage. The uncertainty of the future increases based on the national average weekly wage is a principal factor in the retreat of the insurance industry from this segment of the market.

The solution lies as the bill suggests in repealing this subsection and placing a "cap" of 3 percent annually, on the escalation amount. This will have the dual effect of again restoring some certainty to a virtually unpredictable area and assisting in reducing long range overall costs of the program.

UNRELATED DEATH BENEFITS

The Longshore Act is the only workers' compensation law paying death benefits to survivors of permanently disabled employees when the death was not employment or employment-injury related, such as by murder or suicide. This costly form of life insurance was not contemplated when the Act was originally passed, and it further complicates the matter of risk predictability.

The bill correctly repeals this section.

WEEKLY BENEFITS - DEATH CASES

Through an admitted drafting oversight, death benefits are not subject to the maximum of 200 percent of the national average weekly wage. Taking into account that these benefits are indexed, this is an exceptionally costly oversight. Nevertheless the Supreme Court has expressly stated that the Congress must correct this error. The bill caps the maximum at 200 percent of the national average weekly wage - the solution we believe was intended originally.

PERMANENT PARTIAL DISABILITY

The Act as amended allows for recovery for unscheduled permanent partial disability when there has been no loss of wages. An employee can resume work at full pay, with the permanent partial benefits serving, in effect, as supplemental income. S. 1182 redefines wage earning capacity for permanent partial disabilities and prohibits double recovery for scheduled and unscheduled awards. Again, the bill significantly improves the present law.

ADMINISTRATION

The administration of the Act has been improved by the bill's proposals which return much of the administration to the deputy commissioner who is closer to the day to day activities of the program. Further, having the Benefits Review Board members appointed by the President adds a cloak of objectivity to their tenure and insulates the board from possible political pressures.

MEDICAL

Under the 1972 revisions every licensed physician is granted the authority to provide services under the unrestricted authorization of the Federal Office of Workers' Compensation Programs. As a result Deputy Commissioners have great difficulty in supervising medical care. The "freedom of choice" of physician has merit in the abstract, but as a practical matter unnecessarily increases costs and often the worker does not get the best medical care. The bill has a number of proposed changes in this area which will restore stability to the medical segment of the Act. Two are noteworthy of comment -- requiring an injured employee to select a physician from a listing submitted by the employer and approved by the deputy commissioner and requiring suspension of compensation for an employee's unreasonable refusal to undergo treatment or examination.

The bill's sponsors should reassess its social security offset provision which we believe is a mistake. The area of occupational disease and occupational hearing loss also needs improvements in the language used. To this end we intend to submit proposals to the staff for consideration.

Insurance companies and their reinsurers are retreating from the Longshore market because of its unpredictability. Not knowing clearly who is covered under the Longshore Act, and how inflation will affect future benefits, both insurance companies and self-insurers cannot project their risk exposure and claims losses. A one percentage miscalculation of inflation rates for the year ahead can literally make millions of dollars' difference in the cost of claims.

As Longshore insurance has become less available, many employers have had to turn reluctantly to self-insurance, if they are large enough to afford the bonding, or to more costly and less effective assigned risk coverage. However, for both self-insurers and insurance companies, the same problem then looms: reinsurance. Reinsurers are reluctant to accept unlimited escalation when there is no possibility of obtaining adequate rates.

Untimate losses simply cannot be predicted when future claims payments are linked to inflationary factors, which make it impossible to collect or set aside reserves adequate to protect both insurers and their reinsurers.

Predictability is essential to retain the involvement of companies still voluntarily underwriting or reinsuring Longshore risks, and to attract others back into the market.

CONCLUSION

The 1972 amendments were "pulled together" at midnight amidst furious efforts to get something passed. As is frequently the case under those circumstances, errors are made and poorly thought out ideas find themselves incorporated into law. Even the District of Columbia has abandoned its long association with the Act because of the many problems. We believe S. 1182 addresses many of the needed areas of concern. Hopefully, the Congress will see the pressing need to enact this legislation in the near future.

Senator **Nickles**. Thank you, gentlemen. I have several questions, and I will throw the questions out and you all can grab them as you see fit.

We have had a lot of comments made, I guess, that the industry, as such, is safer, and some have said it is more dangerous. In your opinion, is the stevedoring industry, for example, safer or more dangerous?

Mr. **Maisonpierre**. If one were to look, Mr. Chairman, at the BLS record, it seems that the industry is neither safer nor more dangerous. The accident frequency is pretty flat from 1972 to date.

Senator **Nickles**. Do they get that from the number of claims, or where?

Mr. **Maisonpierre**. No, the BLS does not get that from the number of claims. They get this more, I believe, through OSHA records.

Senator **Nickles**. What about the shipbuilding industry?

Mr. **Maisonpierre**. The very same thing. I took a look at BLS figures from 1974 through the last figures available, and they were pretty flat.

Now, there are aspects of the rating system, of course, which encourage employers to have safe working practices. An employer's workers' compensation costs, particularly a larger employer's costs, are very much affected by the safety record of that employer. So, there are many incentives.

On the other hand, there are, I believe, some disincentives in the act itself for safety. It is too easy to claim benefits; it is too easy, because of the presumption sections, to bring a claim under the Comp Act which may very well have occurred outside of the Comp Act. So, there are almost some disincentives for the employer to spend a good deal of money in instituting good safety practices because the employer will say, "What is the use? I am going to get stuck with anything that happens to my employees anyway."

Senator **Nickles**. Would you explain that? We have not dealt with the presumption clause as extensively as we possibly should. Would you go into that a little bit further?

Mr. **Maisonpierre**. Let me give you an example. An employer may know very well, through some investigation he may have performed, that an employee may have strained his back at home moving a refrigerator. But the employee comes in on Monday morning and says, "Last Friday when I was at work, I lifted a box of nails and I felt a twinge in my back, and I did not report this thing to anybody because I thought it would go away."

The employer knows that that employee may have been moving a refrigerator at home and that it was after that incident that the employee fell flat on his back. The presumption really prevents you from overriding the employee's claim that he was injured at work, because the weight of the evidence that you must present is overwhelming. As long as the employee says, "I did something at work," it is almost impossible to disprove that it occurred anywhere but at work.

Mr. **Flockhart**. I would add, Senator, that there is a case pending before the Supreme Court now concerning the presumption, and I believe the facts of that case indicate that there is absolutely no evidence at all from the injury resulting from something that happened at work. But because of the presumption, there is no way of getting around it.

It may be desirable, Senator, for you, before you finally mark up this bill, to look at the facts of that case and try to address this issue.

Senator **Nickles**. If these amendments that we are proposing do become law, are we taking away the employer's incentive to provide a safe workplace?

Mr. **Maisonpierre**. I believe, Mr. Chairman, that are reinstituting all of the incentives which are present in the traditional compensation systems. We still keep this very liberal act, and I might say you continue this as a very expensive act. You are reducing the cost of the system by about 22 percent, on average. It still will remain an expensive law because it is a very liberal law, but you have not reduced one iota the incentive. In fact, I think you have increased the incentives.

Senator **Nickles**. You mentioned a reduction—I do not know how anybody can know for sure—but, anyway, a reduction in premiums of about 22 percent. Where do you come up with that 22 percent?

Mr. **Maisonpierre**. If you do not mind, Mr. Chairman, I would like Mr. Kallop to answer that; he is from the National Council.

Senator **Nickles**. Please do.

Mr. **Kallop**. Senator, I am Roy Kallop from the National Council.

We have a standard approach for valuing law amendments, where we actually compute what the cost conditions are under the old law and what the cost conditions are under the new law, subjecting our formula to exactly what is contained in each law.

We actually build up monetary costs for each type of injury—the fatalities, the permanent totals, the permanent partials, the temporary, and the medical. Then we have losses under our statistical reporting system by type of injury that we can use as weights to get the overall effect.

We applied this standard approach in computing the evaluation which led to the 22-percent reduction.

Mr. **Maisonpierre**. I may say that workers' compensation rates are filed with State insurance commissions and must be approved by State insurance commissions. I can assure you that with the pressures under which the insurance commissions are today, particularly with respect to Longshore, they will see to it that we apply the rate reductions.

Senator **Nickles**. It was alluded to earlier that a very large percent of the premium went to overhead, and you alluded to some statements. Could you give me a total overhead figure of compensation premiums—Longshore premiums?

Mr. **Maisonpierre**. Five and three-tenths percent went for general expenses, and 7.5 percent went for sales expenses; that means 12.8 percent.

Senator **Nickles**. Let me turn that around. What percentage went out in paid claims to benefit the injured workers?

Mr. **Maisonpierre**. Eighty-three and six-tenths percent went for the payment of benefits and loss adjustment expenses.

Senator **Nickles**. And that is all when you are going through a carrier. It was mentioned earlier by people who are brokering in the business that a great number of people are self-insuring because they cannot get carrier insurance. Have you found that to be the case?

Mr. MAISONPIERRE. I believe, Mr. Chairman, that the three companies that testified before you the other day are about the only three companies that write this business on a voluntary basis. That does not mean that the other insurance carriers do not get involved in the coverage, because as was mentioned today by the producers panel, all carriers get involved in writing this business through the assigned risk system and they share the losses on a proportionate basis.

But the three companies that testified before you the other day are about the only ones that are seeking this business on a voluntary basis. Now, before the 1972 amendments, in our association we had about seven or eight companies that were very active in the field. Today, they have dropped out of it because they just do not feel that they can expose their assets to the unknowns that they face.

We have an interesting case where one very small company in our association, called Florist Mutual—that company sells insurance and provides insurance only to florists. The company is extremely perturbed because it has been forced to sue longshore coverage, mind you, because it does not know whether, somewhere down the line, the Benefits Review Board, Department of Labor or the Supreme Court will hold that a florist delivering a bunch of flowers on a cruise ship—where injured on that cruise ship may not fall under the Longshore Act.

So, here is a very small company; it does not have any real expertise in longshore. It is located way out in the middle of Illinois. It has to provide longshore coverage and is really up the creek.

Senator NICKLES. Is that navigable water? [Laughter.]

Mr. MAISONPIERRE. It believes it is.

Mr. FLOCKHART. To add to something Andre has said, I do not think it is a correct or accurate statement to say that people cannot get coverage through the assigned risk pooling mechanism that the industry provides. Anyone who needs coverage can obtain it.

Senator NICKLES. Is it affordable?

Mr. FLOCKHART. Well, that depends on what your price is, sir. One of the concerns with the small marinas, for instance, and recreation boatbuilders who were not generally considered to be within the scope of this act—we always think of this act as being applicable to stevedoring operations at the Port of New York, and what have you. But those companies are small companies and the price is high.

Senator NICKLES. Those small companies, under present interpretation, are required to be covered by longshore?

Mr. FLOCKHART. That is the interpretation that has been given to them by DOL.

Senator NICKLES. A marina in the middle of North Carolina or Oklahoma is basically required to be covered by longshore I would think that under most cases, those individuals are not aware of that fact and they probably have purchased coverage just for State compensation. But the employer would be liable for the additional liabilities?

Mr. FLOCKHART. That is correct. Our standard policy of workers' compensation insurance does not provide Longshoremen Act coverage unless it is amended or there is an attachment added to it to provide that coverage; it is normally State act coverage. So, if you did not know you were under it and you did not purchase the additional coverage and you were hit with a claim, your coverage would not provide that.

Senator NICKLES. We are talking about returning to the water's edge, and we have heard some complaints from people saying that this is inadequate. Those people would be covered by State compensation, am I correct?

Mr. FLOCKHART. Oh, yes.

Mr. MAISONPIERRE. Absolutely. Actually, S. 1182 would not return to the water's edge; it would return to the point of rest.

Senator NICKLES. Point of rest, yes.

Mr. MAISONPIERRE. People who would not be covered would be covered by the States, just as they were covered prior to 1972 by the States.

Senator NICKLES. Prior to the 1972 amendments.

Mr. FLOCKHART. It is hard to imagine, reading S. 1182 and the way the various laws have been interpreted to date, that anyone is going to be left without; it is a matter of what the recourse is, not whether or not there is recourse.

Mr. BUNN. Senator, one of the companies that is a member of our association testified last week—Midland. They are one of the larger writers that has stayed in the market. The reason they have stayed in the market is they have a long history of specializing in providing this type of coverage.

The majority of our companies left the market since 1972, simply because they just are unable to determine what their exposure is and what the amount of risk they are having to write is. The few companies that have stayed in it, like Midland and the other two that testified last week, have stayed in it simply because they have developed a considerable amount of expertise that has allowed them to be able to figure out how to stay afloat in the business.

The majority of them simply would like, probably, to get back in it, but they do not feel, because of the uncertainties in the act, that they can determine what the amount of the risk is and how to insure it.

Senator NICKLES. Mr. Bunn, if S. 1182, or something similar were adopted, do you think it would increase the potential for other people to get into the system so that the coverage could be provided?

Mr. BUNN. Sure. I think that there will be a number of companies that will come back into the system once there is some certainty in defining what the limits of exposure are. I think there will be a good many carriers that will come back into it. They have just left because of frustration.

Senator NICKLES. All of you represent different insurers and are familiar with other compensations. Can you think of any other State workers' compensation, I guess, or compensation program that is as liberal in benefits as the Longshore Act?

Mr. BUNN. No; I do not think so; I do not know of any other one. Probably, the most liberal, perhaps, is in Alaska, but I do not know of any other State act that comes anywhere close to the limits of this type of act.

Mr. MAISONPIERRE. There is one, Mr. Chairman, and that is FECA—the Federal Employee Compensation Act. I have recently read over about four volumes of studies made by the General Accounting Office of FECA, and the problems that FECA has are very identical to the problems in the Longshore Act—runaway costs and an overwhelming increase in claims. There is no relationship to the growth in the number of civilian federal employees covered under the act.

There is a tremendous similarity between the problems of FECA and the problems in the Longshore Act. GAO has made a number of recommendations for FECA, and they are not all that far removed from your recommendations in S. 1182.

Senator NICKLES. We are aware of the recommendations. Actually, I have here a copy of the GAO report which deals with amendments that were made in 1974 to FECA. It is by Elmer Staats and basically suggests very significant changes to try to reform that system, which we will be endeavoring to do.

I will ask a couple of other questions. Are any of you somewhat familiar with the Canadian compensation scheme?

Mr. MAISONPIERRE. To some degree.

Senator NICKLES. Is it adequate? I remember the statement that Canadian port workers' compensation rates were $3, $4, and $5 per 100. Our rates in New York and Boston and New Jersey were $80 and $60 and $50, so they were 20 to 30 times as high as their rates. I am wondering what the differences are.

Mr. MAISONPIERRE. Well, Senator, some of the rates in Canada did go up, I believe, to $11 or $12. What you have in Canada is you do not have the difference between a law applicable to mainland accidents and a special coverage applicable to the longshore operation. That which applies in a Province for any worker applies to the shipbuilding as well as the ship loading operations.

As we compare the rates in Canada with the rates in this country for the State compensation system, there is not all that much difference between the two.

Senator NICKLES. The Canadian system is close to our State systems, but it is the longshore that is kind of standing out.

Mr. MAISONPIERRE. If there is one thing that perhaps characterizes the Canadian system, it is that it is much more of what we call a wage loss system. You may remember Senator Hawkins making some allusions to what happened in the reform programs in Florida that were enacted some years ago.

Most of the benefit dollars spent in Canada go for wage replacement, which is exactly what Florida has done. There is a significant movement in that direction in your legislation by a reform of section 8(c)(21). But there is a great deal of similarity between Canada and Florida, and I think that S. 1182 is moving in that direction.

Senator NICKLES. Would you touch on 8(c)(21) again, because I think that was referred to earlier?

Mr. **Maisonpierre**. This is the particular subsection that deals with the nonscheduled disability. Today, it provides that if an individual is injured and is found to have a certain percentage of loss of earning capacity, he or she will be paid benefits for life, regardless of whether this individual is working at full wages or higher wages.

I have a case which I cited last year when we testified. I believe the total medical expenses were $88; the temporary total disability was about $400. In other words, he lost a couple of weeks from work. He was found to have a 20 percent loss of wage-earning capacity. This individual was back as a longshoreman making more money than he was before the accident.

The potential value of the case was about $95,000. The insurance carrier paid the 20-percent loss of earning capacity for about 3 years—about $10,000. Finally, they ended up settling the case for an additional $15,000.

So, here we have a case of an individual that lost about 2½ weeks from work; he had $88 of medical expenses. He kept working afterwards at a higher wage than before the accident. The case cost about $25,000.

Now, you are correcting that in your legislation. In your legislation, this individual would receive benefits when he or she was not working or working at wages less than those earned before the accident. If that individual is working at similar wages or higher wages, that individual will not receive benefits until he or she is forced out of work because of the disability.

Senator **Nickles**. On the theory that the whole premise of workers' compensation is to supplement or replace lost wages—on the same train of thought, and it has not been mentioned today—there is the pyramiding and the coordination of benefits. I know that in past insurance dealings that I have had, whether it be medical, and so on, we had coordination of benefits.

If the husband and wife were both covered by two medical insurers, the cost for this broken arm would not be paid for twice.

We have attempted to put some coordination of benefits in this, where individuals would not receive the pyramiding of benefits and basically be overcompensated. Would you care to reflect on that?

Mr. **Maisonpierre**. We strongly support the coordination of benefits so that an individual's benefits are limited by a percentage of wages that that individual was earning prior to the accident.

With respect to S. 1182, we do have one point which we made in our statement, where we have perhaps some disagreement with you, and this is the coordination between the social security disability benefits program and longshore.

The present social security program provides for coordination to the extent that social security disability benefits shall be reduced—if the combined benefits of social security disability and work comp exceed 80 percent of preaccident wages, then social security benefits shall be reduced accordingly.

Unfortunately, the program has not worked very well because of inadequate administration. The congressional tax-writing committees right now—both the House Ways and Means and the Senate Finance Committee—are in the process of strengthening this coordination to insure that the administration is properly carried out, and extends the coordination to age 65. Under the present law, the coordination evaporates at age 62 for some reason.

Also, the present action by the tax-writing committees would prohibit the States from reducing their workers' compensation benefits by social security benefits. We would suggest that you may want to coordinate your activities under S. 1182 with the activities of the tax-writing committees so that there is a single congressional purpose in the action.

Senator **Nickles**. In other words, should social security disability be primary and this be secondary?

Mr. **Maisonpierre**. No; we would suggest that work comp be primary and social security be secondary.

Senator **Nickles**. If they were going to be coordinated, the reduction would be made on the social security side?

Mr. **Maisonpierre**. Yes; and there are really two basic reasons for that. No. 1, social security benefits are paid out of scarce funds today. You know, it is hard enough to raise money for social security.

No. 2, we think that when there is a specific benefit program such as work comp, the cost of work injuries should be internalized within that system.

Senator **Nickles**. I concur.

Mr. **Maisonpierre**. This way, you enhance the safety objective of work comp.

Mr. **Flockhart**. We should note, Senator, that in fact, under the social security law, the disability program is coordinated. As Andre has said, you do not get your full social security; you only get a portion of your social security on top of your workers' compensation insurance.

If the so-called reverse offset, where you now say reduce the workers' comp program by social security—that undoes a coordinated program that is already in place.

Senator **Nickles**. Well, it would be in conflict, too, I think. We will address that.

I will reiterate my earlier statement to all persons—those interested in this legislation—that we very much solicit your input to make this legislation better, and that is for people that want to see it changed and people that do not want to see it changed very much. We do solicit your input to make this good legislation so we can live with it for some period of time without having to come back.

It was mentioned earlier that we should continue to have hearings to try to clean up the abuses. I think it should be repeated for those individuals and for others that Congress has had a lot of hearings but done very little concerning the Longshore Act and some of the changes. We have had a lot of studies made by GAO and many by other independent groups that have stated a very strong need and desire for change, but Congress has not acted in the past. They have held hearings and then gone on.

It is not our intention to do so. It is our intention to see if we cannot make some changes. We are committed to try and clean up the system and providing a fair and equitable system for all concerned.

If you do wish to have input on this, we will keep the record open until July 20 of this year for additional statements for the record. We solicit your input in that regard.

Senator East, do you have any comments or questions?

Senator EAST. I just wanted to, if I could, please, clarify one or two points. It will not take me but a minute to do it.

As I understand your testimony, gentlemen, there is not any other workers' compensation program that is of this character. I mean, this is quite a unique problem we are dealing with in terms of many facets of it—obviously, the escalating rates, the problem of presumption, and so on and so forth.

On a comparative basis, I gather you are saying that this is a very unique program and, economically, it is causing great havoc in terms of people willing to insure and in terms of what it is doing particularly to smaller employers in the pertinent businesses.

Am I correct that we are dealing with a very unique and extraordinary kind of problem?

Mr. FLOCKHART. I do not know, Senator, whether I would say unique. It is a workers' compensation program, and fundamentally it is the same. I think the problem is that it is a workers' compensation program that has run amok, and it has——

Senator EAST. You mean this one or all of them?

Mr. FLOCKHART. Well, this one, primarily, but I can tell you that there are problems in some of the States, too. But it is a situation where through 1972, the benefit levels were totally inadequate, and that inadequacy was made up with a vengeance. Now, it is a matter of getting back into proper perspective and realizing that while $70 a week is inadequate, $400 a week is quite high, and those dollar benefits have got to be distributed with discretion and with an intent to provide the dollar benefits to the people who are properly deserving and who are not able to work.

If that discretion is not, in fact, applied with direction from the Congress in enacting this bill as well as the administrators and the courts, we will continue to have problems. I think this is a first step that you are taking to provide the direction from the Congress that we must get ourselves back in line; that there is no such thing as the bottomless pit.

Senator EAST. It is just a bit more aggravated right now in this area, but there are problems in other areas too and are continuing to grow and develop, is that correct?

Mr. FLOCKHART. There were many States, I think, to say fairly, that encountered the same situation that the Longshore Act encountered in 1972. The benefit levels were totally inadequate, and then that inadequacy was corrected overnight and the system just ballooned. There were a lot of precedents on the books.

As I have said on many occasions, no one is more innovative than the courts and administrators, when they are confronted with inadequate benefit levels, to distribute them liberally to try to make someone as whole as possible. The problem is that that precedent was already there, and then we were not distributing $70 or $80 or $90 a week; we were distributing $200 or $300 a week.

We should not take away the $200 or $300 a week as a maximum benefit; that is an adequate benefit, and appropriate. We firmly believe that the high benefit levels can be maintained, and so can the cost, if they are distributed appropriately.

Senator **East**. This will be my final question. Is the presumption provision in the current law unique in the workmen's compensation field?

Mr. **Flockhart**. There are generally presumptions in most State laws. Quite frankly, when I get back to my office, I am going to pull out the court case that is pending before the Supreme Court and brief it for you.

I believe the scope of the Longshore Act presumption—and I qualify my answer, quite frankly; I do not have it on my fingertips—but I believe it is much more liberal than most State courts. But there are generally presumptions, this being a social insurance program, that you do fall within the scope. There is a presumption that it is work related, so to speak.

The question is, What facts do you have? Do you have to have no facts other than the fact that there is an injury? Then the whole universe becomes work related. I think the presumption in the Longshore Act, and certainly the provision that is currently before the Supreme Court for consideration, is broader than the average provision in State law.

Senator **East**. Normally, what would be the presumption in workmen's compensation?

Mr. **Flockhart**. I think generally the presumption is that the injury is arising out of and in the course of employment. When something happens on the job, you overcome any suggestion that possibly—and you should, because it is a no-fault system—you overcome any presumption that possibly this was caused by the individual's misconduct, say, or that some other person caused the injury.

Senator **East**. Is it commonplace, then, for the presumption to work to the advantage of the employee?

Mr. **Flockhart**. Yes.

Senator **East**. They do not come to the table weighted evenly, and you weigh the evidence on both sides and go accordingly. You come with the presumption, generally speaking, in workmen's compensation in favor of the employee, is that correct?

Mr. **Flockhart**. I think generally that is correct, Senator.

Senator **East**. What is unique, then, about this program?

Mr. **Maisonpierre**. Senator, I think what is so unique about the Longshore Act—and I might say that I believe that the presumptions presently in the Longshore Act are quite similar to the presumptions of the New York act; they were borrowed verbally from the New York act.

What makes this act unique is the way these presumptions have been interpreted by the Department of Labor's administration and by the courts. As Bob Flockhart has indicated, it is a matter of the evidence that needs to be provided to rebut these presumptions. It is, to a large degree, how the administrator views whether or not the carrier or the employer has overcome the weight of the evidence.

If you have an administration which is absolutely blind to the evidence, then there is no way one can overcome these presumptions. The presumptions were placed in the law to provide some points of reference so that the employee, by law, could make his case a lot easier. It did not suggest that the administrator should look at the evidence produced in a very liberal way. The facts of a case should be weighed evenly by the administrator based on certain presumptions.

But the Administrator in the Department of Labor and the courts have almost disregarded facts on the basis that presumptions do not allow them to weigh the facts. That is not what the law says.

So, I believe what needs to be done in S. 1182 is to correct a very faulty administrative history which has been in existence since 1972. We really did not have that much of a problem with the presumptions prior to 1972; this occurred since 1972. Yet, there were no changes in the presumptions in the 1972 amendments.

What we were faced with was a new administrative mentality that used the presumptions and considerably broadened the use of the presumptions or the application of the presumptions beyond that which had been intended by Congress, or by States for that matter.

If I may add to one more point to something you were referring to earlier, I think there is one very uncanny thing as we look at the chart which the chairman prepared for these hearings. If you look at the rate of change in the claim and benefit levels to see how they parallel. As we see a drop in the rate of increase in benefits, we see a drop in the rate of increase in claims.

It is almost as though the benefits themselves are going to rule the number of the claims which are going to be made. It is an uncanny relationship which really has no economic basis. It is a question of utilization.

We plan on doing the very same study for some of the States that have been troublesome, to see if we can trace this type of relationship. As benefits go up, we automatically have an increase in the number of claims.

I think this chart is a very revealing chart, Mr. Chairman. We appreciate having the opportunity to see it.

Senator EAST. Thank you.

Senator NICKLES. Thank you, Senator East.

Just to follow up on the discussion of the presumptions, in most States, the presumption clause, if you want to perceive it as that, or at least as I understand it from working in Oklahoma, was that if an individual falls off a ladder and is injured in the workplace, it is not debated about whether or not it was his fault that he fell off the ladder. There is no question of who is at fault—the employer or the employee. He may have been warned not to get on that ladder because that ladder may break, but he got on it and he fell and he sprained his ankle.

He is automatically covered, period. It is presumed that he is covered; that is the coverage. Where the abuse has come in, as I understand it, on Longshore is that the presumption clause under Longshore has been interpreted where you could come in and basically the employer is foreclosed from even presenting any evidence, or it is almost not adhered to by the administrative law judge, even if the evidence states that this individual broke his leg playing hockey, you know. He may have limped to work that Monday morning, but he was able to file a claim and be successful.

What we are trying to do, here again, is not foreclose any benefits for a person legitimately injured or injured in the workplace. We are trying to clean it up to where an individual will not be able to be injured playing football and then make a fictitious claim saying that he was injured in the workplace and being able to receive very generous benefits.

Mr. MAISONPIERRE. Another use of the presumptions—I believe it was a case which was cited last week—this is an individual who produces a medical report from a general practitioner that says that this individual has a disability which is related to employment. Now, this came from a general practitioner.

The employer and the insurance carrier and, I believe, the impartial medical examiner, who was a board specialist and orthopedist, said that this condition has no bearing to the accident. The administrator said, "Well, the presumption says that to the extent this individual produces a medical report saying that there is causal relationship, the presumption prevails."

It does not make any difference how extensive the medical rebuttal is that the employer or insurance carrier was able to bring about to show there was no relationship. The administrator says the presumption prevails.

Mr. BUNN. Senator, I would like to make a couple of comments. The presumption, traditionally at the State level, has been in workers' compensation that you had a liberal interpretation of the law. So far as the facts are concerned, there have been some courts through the years that have extended that to the facts of the case, and I think that is what has really happened in the type of presumption that you have in Longshore.

Not only do you have a liberal presumption relating to the law, but it has crept into the factual side of it, which means it is very, very difficult to rebut any type of evidence that is put on by the employee.

I think second, Senator East, in your earlier request for comments on the Longshore Act and as to whether or not this was unique, I think it is not unique in the sense that there are certainly a number of the State workers' compensation laws that are replete with a number of problems that have resulted from the changes since 1972 in their own laws.

I do think it is unique in the sense that I think that if you were looking for one act that had a whole grocery list of things that need to be changed in order to update it, I think this act probably has as many things that need to be corrected as any I know of.

Earlier, Senator Nickles had asked if there was any other act that was as bad off as this one, and Mr. Maisonpierre said the FECA, and I would agree with that. Certainly, the black lung program is also a program that has a number of serious concerns.

But my response to your question was basically in the State laws; that I think that this one probably has more difficulties in it, in the law and in the way it is administered, than any State law that I know of.

I think that the effort of the insurance industry is not to try to take away needed benefits or to roll back the law to what it was pre-1972. There certainly were things that needed to be corrected, and the benefit structure needs to be adequate. But on the other hand, it needs to be put in some type of balanced perspective as to cost, affordability, and insurability to make it a reasonable workers' compensation law that both employers can afford to have and insurers can afford to insure and be able to insure.

Senator NICKLES. Do you find a direct relationship, possibly, between the workers' compensation programs that are somewhat in trouble and the amount of Federal Government involvement in those programs—between FECA, black lung, and longshore, all of which are under the purview of our committee and all of which have had Federal Government design and implementation?

Mr. BUNN. Well, I think, philosophically, at least for our insurance trade association, we prefer to see these programs administered at the State level. I think that there are a number of problems that are inherent in the Federal programs. As to whether or not that is just because they are Federal programs, I am sure we could probably make a strong case for that, but I think basically when you try to leave the philosophical side alone, I think it has a lot to do with the way they are administered. It has a lot to do with the overall benefit structure that is inherent in these bills.

Senator NICKLES. Senator East, do you have any other questions?

Senator EAST. No.

Senator NICKLES. Gentlemen, we thank you very much for your comments. The record will be kept open through the 20th. We do solicit your input and very much appreciate your cooperation. Thank you very much.

Mr. FLOCKHART. Thank you, Senator.

[The following material was subsequently received for the record:]

Industrial Union of Marine and Shipbuilding Workers
OF AMERICA, AFL-CIO
REGIONAL OFFICE
111 CHERRY HILL ROAD
BALTIMORE, MARYLAND 21225

EARL W. BARNES
Regional Director

355-2500
355-2501

June 19, 1981

Mr. Don Nickles
Chairman, Subcommittee on Labor
UNITED STATES SENATE
Committee on Labor and Human Resources
Washington, D. C., 20510

Dear Sir:

Enclosed please find three copies of the testimony which I was supposed to present to the Subcommittee on June 23, 1981.

I am sending this Statement to you as requested, with the assumption that it will be made part of the record along with the other testimony presented to the Subcommittee on the subject.

Yours very truly,

Earl W. Barnes
Regional Director

STATEMENT BY

EARL W. BARNES
REGIONAL DIRECTOR

INDUSTRIAL UNION OF MARINE AND
SHIPBUILDING WORKERS OF AMERICA

Accompanied by:

FRANK DERWIN
NATIONAL PRESIDENT

ARTHUR E. BATSON, JR.
Vice President & Secretary-Treasurer

THOMAS D'AMICO
National Representative

Before

SENATE SUBCOMMITTEE ON LABOR AND HUMAN RESOURCES

IN LEGISLATIVE HEARINGS ON S. 1182 AND THE

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Washington, D. C.

June 23, 1981

Mr. Chairman, and members of the Subcommittee: I am Earl Barnes, Regional Director of the Industrial Union of Marine and Shipbuilding Workers of America. On behalf of myself and the members of the Union that I represent, I want to thank you for this opportunity to appear before this august body and express our views on the proposed changes and the effects that are set forth in Senate Bill 1182.

I will not belabor your time constraints by repeating statements that are already in the record, and which we fully support, made by members of I.U.M.S.W.A. from the West Coast and Mr. John Sheehan, Legislative Director, United Steelworkers of America.

Having worked in the Shipbuilding and Shiprepairing Yards in Maryland for more than thirty years, and having been injured while performing my job as a rigger, I think I can speak with some authority on what ill effects Senate Bill 1182 will have on a large percentage of Shipyard workers.

To regress a little, at Wednesday's hearings, Representatives of the Shipbuilders Council of America, Representatives from the National Association of Stevedores and Mr. Steiner from the New York Port Authority stressed and re-emphasized that since enactment of the 1972 Amendments to L.H.W.C.A. costs have escalated to the point that it is "no longer insurable or affordable".

I assure you that the shipyard worker has contributed very little to this escalation. Any increase in the number of claims is due mainly to the unsafe working conditions under which the shipyard worker had to perform his job. These unsafe working conditions in almost every case have been inspected and reported by the Union's Safety Representaives.

A Representative from the Shipbuilders Council of America - please pardon my referral to these gentlemen as representatives - from my position in the back of the room I was uncertain as to who made certain statements; stated that there is approximately 172,000 persons working in the shipyards' private sector and only 20% of these work over navigable waters. He went on to describe and compare similarities of jobs in the shipyard shops and other land based industries. Another member of this panel went on to describe the work as being performed by gangs who go aboard the ship and remain there all day, with less than 15% coming off the ship during the day. I would suggest that those representatives from the Shipbuilders Council of America are execellent lawyers, but are not totally familiar with building and/or repairing ships.

Let me just describe a phase of shipyard work. I am a rigger by craft or classification. Riggers, by nature of their job function, are on and off a ship many times during a day. If we are changing a propeller, gear has to be gotten together on the piers and we work from pier to dock. In some instances we change a wheel or rudder overboard. We are on and off the ship or dock while working on shell plates, ships' rigging and engine room machinery.

Take a temporary light man, he may be on as many as five or six ships during a work shift.

While working as a rigger, I was injured. I fell 24 feet, broke my heel and ankle. I was covered under the State because I was shore-side. I received $35.00 per week compensation and lost four months and three weeks from work. One year later I was hospitalized to have the ankle joint fused. I lost another four months and two weeks from work and again received $35.00 per week compensation. I have indulged your patience with a recap of my personal experience in an effort to show this Committee the regressiveness of these proposed changes; namely:

1. excluding a shipyard worker from L.H.W.C.A. coverage while working a few feet from the "waters edge".
2. reducing compensation benefits to a point where an injured worker is often poverty striken and consequently is forced into a mediocre settlement,
3. is too often forced to be treated by a less than competent, concerned physician; and
4. to repeal Section 20 and place an unfair and unnecessary burden on an injured worker.

For anyone to entertain the idea that an injured shipyard worker makes out financially better while off due to injury is just not so based on my experience and that of many others.

To change definitions to exclude thousands of shipyard workers is too drastic a measure to take to insure employers lower premuims. To return to the "waters edge" concept is like turning back the hands of time on an arsenal of this country's most needed worker during strife. To limit an injured worker to a list of physicians who he had no choice in selecting will be depriving him of a speedy recovery with confidence in nearly every instance.

I would also like to mention, for the record, that Mr. Gardner testified that the closing of the Brazwell Yard in the Boston area was due in part to costs of workmen's compensation. We know that that is not entirely true, the Navy Department stated that they would not give anymore Navy work to Brazwell after the Navy vessel TRUETT had some faulty steel installed while undergoing repairs in the Brazwell Yard.

Whatever reasons are given by the employers and insurers for their support of Senate Bill 1182, it is quite apparent that their real reason is gross, heartless reduction of benefits to employees injured in the service of their employer. Moral responsibility and human compassion are once again to be sacrificed for profits. This purpose of the Bill is reflected in its many unrealistic and illogical provisions.

Much has already been said about Section 2(a) of the Bill with its unreasonable delineations of coverage under the Act. A number of examples of the absurd effects of this provision have already been given. None better states this effect than the comment that under this Bill a given employee would be covered one minute and not covered the next, and so forth throughout his/her work day. Certainly a matter as serious as the welfare of a worker who has fallen victim to the hazards of industry -- indeed the extra hazards of the maritime industry -- should not be subjected to the fortuitous results under Section 2(a).

The provisions in Section 5(a) of the Bill, pertaining to physicians, are also unreasonable. Without reiterating comments that have already been made with respect to the unfairness of the selection process, the lack of logic of the whole section is epitomized in Subsection (e) (3) (page 13 of the Bill) which provides that an employee who is dissatisfied with an independent physician's evaluation of his disability may request a re-examination by one or more of the physicians on the list provided by the employers.

The same disregard for logic is to be found in Section 6 (b) (2) of the Bill which deals with compensation for hearing loss caused by exposure to noise during the course of employment. It provides as follows:

> "For compensation purposes, losses (sic) of hearing due to industrial noise shall be confined to the frequencies of 500, 1000 and 2000 cycles per second. Loss of hearing ability for frequency tones above 2000 cycles per second are not to be considered in constituting disability."

It was once thought that, because most speech falls within the range of 500 to 2000 cps, that any loss of hearing above 2000 cps was not industrially disabling. This perception has long since been discounted.

In a report published by the Office of Noise Abatement and Control of the United States Environmental Protection Agency (EPA 550/9-79-101; August, 1979), it is stated:

> "Averaging the pure-tone audiometric hearing levels at frequencies of 500, 1000 and 2000 Hz was then assumed to be a valid index of hearing ability. This criterion is inadequate on several grounds. ...It excludes the essential communication functions of understanding and discriminating speech."

It is further pointed out that "in an atmosphere with background noise, competing signals from different directions, accents, mumbling, poor positions, distortions and other interferences ... which might be as often as 50% of the time, high frequency hearing is very important for an adequate understanding of speech."

In 1972 the National Institute for Occupational Safety and Health adopted the criterion of 1000, 2000 and 3000 cycles per second. The reasons given for this criterion were as follows:

> 1. The basis of hearing impairment should be not only the ability to hear speech, but also the ability to understand speech.
>
> 2. The ability to hear sentences and interpret them correctly in quiet is not satisfactory evidence of adequate hearing for speech communication under everday conditions.

In its Guide for the Evaluation of Hearing Handicap, published in 1979, the American Medical Association stated that "the hearing threshold level at 3000 Hz should be included in the calculation of hearing handicap to provide a more accurate assessment of hearing handicap in a greater variety of everyday listening conditions

This revision followed the recommendation of the American Academy of Otolaryngology which in 1978 approved a change in the formula to include the 3000 Hz frequency.

Thus, the entire medical and scientific community has acknowledged that the 3000 cps frequency should be taken into account in evaluating a person's hearing loss. Yet the proponents of this Bill for their own venal motive of higher corporate profits are asking this committee to apply a discredited and inadequate formula to claims for loss of hearing under the Act.

Not only is Senate Bill 1182 regressive, illogical and unreasonable, it is also superficial in its singleminded effort to reduce benefits to an injured employee. This is demonstrated by Section 6(3) (B) which reads as follows:

> "(21) Spine: In the absence of evidence of a herniated or ruptured disc, 312 weeks of compensation."

Historically and universally, the workmen's compensation laws throughout the country have provided for back injuries in the "Other Cases" section contained therein. An obvious reason for this practice is that the back, including the spine and its supporting ligaments and muscles, is an extremely complex part of the human anatomy. A fractured vertabrae may cause little or no permanent disability or may cause total permanent disability. Legislators in their wisdom have always seen fit to leave the complicated process of evaluating a back injury to the commission or the court charged with the responsibility for making such an evaluation on the basis of competent medical evidence. It is inappropriate for any legislature, including Congress, to attempt to place a specific amount of compensation upon an injury to the spine.

Like many other provisions in this Bill, Section 6(3) (3) is out of touch with reality.

If one can hypothesize an injury to the spine that resulted in permanent total loss of use of the spine, surely the injured person would be permanently and totally disabled -- indeed, he or she would very likely be a basket case. Yet this Bill would limit the worker so injured to 312 weeks of compensation -- the same amount of compensation awarded for the total loss of use of an arm

Utter disregard for the human condition is well reflected in Section 6 (4) of the Bill which would terminate an employee's right to compensation for permanent partial disability under the "Other Cases" provision of the law, upon the employee's reaching "the retirement age prevailing in the industry and geographic region within which the employee was employed at the time of the injury".

(Page 21). It is a common experience that persons obtain employment after their retirement. Indeed, many, many times retirement benefits are so low, that it is necessary for retirees to supplement these benefits by obtaining other employment. Under this Bill, a retiree whose ability to engage in such employment has been diminished by an injury at work before retirement, would be deprived of the compensation to which he/she would be entitled, but for reaching retirement age. It must be kept in mind that any retiree who would be affected by this section of the Bill continues to be disabled after his retirement; otherwise, his/her compensation would be discontinued even under the existing law. Yet the proponents of this Bill would deprive that perso in his/her declining years of his/her life of compensation benefit to which he/she is entitled.

The extremes of the hardship this Bill could cause cannot be overstated. The term "permanent partial disability" as used in this section encompasses disability of all degrees short of total disability. A person receiving benefits under Section 8(c) (21) of the existing Act (This subsection would be redesignated as Subsection 8(c) (22) could be so seriously disabled as to have no realistic opportunity of obtaining employment in the open labor market upon retirement and he/she would be nonetheless denied compensation under the Bill regardless of the amount of retirement benefits he/she was entitled to, if indeed he/she was entitled to any retirement benefits at all. One must wonder at the cynical disregard on the part of the sponsors of the Bill of such a person's plight.

One must also wonder how such a provision can be reconciled with the Age Discrimination and Employment Act of 1967.

FOLEY, HOAG & ELIOT
1920 N STREET N. W.
WASHINGTON, D. C. 20036
TELEPHONE: (202) 785-8600

WILLIAM L. GARDNER

KEVIN J. FITZGERALD*
ROBERT D. GOLDSTEIN
*ADMITTED IN MASSACHUSETTS ONLY

IN BOSTON
10 POST OFFICE SQUARE
BOSTON, MASSACHUSETTS 02109
TELEPHONE: (617) 482-1390

JUN 1 1981

June 18, 1981

Honorable Don Nickles
Chairman, Subcommittee on Labor
Labor and Human Resources Committee
United States Senate
Washington, D.C. 20510

Dear Senator Nickles:

On behalf of Braswell Shipyards, Inc., I would like to thank you for the opportunity to testify in support of amending the Longshoremen's and Harbor Workers' Compensation Act. We felt the hearings were quite productive and we hope the entire Congress can act on this important legislation in the very near future. To assist in this effort further, we would like to accept your invitation to supplement the record with some additional information with respect to our experience under the Longshore Act.

First, we wanted to apprise you that the problem of pyramiding of benefits is one of the most serious flaws in the present Longshore program and one of the major contributors to the kind of fraudulent activity we have seen so much of. We addressed this issue beginning at page 11 of our statement, but there are several additional points we wanted to make in this area. One is regarding the reference to at least 100 of our former employees simultaneously drawing unemployment and disability benefits. This reference was to our Boston operation and the number is probably higher, although we cannot verify to what extent. We obtained this information by checking the list provided by the Commonwealth of those workers drawing unemployment compensation against our list of workers receiving Longshore benefits. Apparently, few were concerned with the provision on the unemployment compensation form requiring an applicant to certify that he is not receiving workman's compensation benefits or intending to apply for them. Regrettably, the local prosecutors had scant interest in pursuing this kind of fraud, given its individual case basis.

Another seriously disturbing example of fraud was the oft-encountered situation whereby an injured employee would seek reimbursement for medical expenses through Blue Cross and sign the form denying the injury was work related. Then the employee would subsequently file a Longshore claim saying the injury was work related. We have actually experienced cases wherein the Labor Department Administrative Law Judge has rejected our evidence of a prior Blue Cross claim. Surely this form of mal-administration by the Labor Department requires a prompt and effective remedy.

Another concern of ours is the deplorable situation we described in which an employer has no clear right to participate in Labor Department hearings, particularly when it wants to present evidence of a fraudulent claim. This problem can be cured by inserting in Section 19(c) of the bill language specifying that an employer may exercise all rights, including but not limited to proceedings before the Deputy Commissioner, Administrative Law Judge, and Benefits Review Board, enjoyed by parties under the Act, and regardless of whether any insurance carrier may also appear on its behalf.

We wanted to bring several additional matters to the Subcommittee's attention. On page 9 of our statement we referred to an employee who suffered a heart attack while at work. In fact, the autopsy revealed that the cardiac distress actually began the previous day, a Sunday, on which the employee was not working. This is but another example of the intolerable present situation whereby an employer, in effect, insures the life of his employees under the Longshore Act by paying benefits for non-work related deaths.

Finally, we suggest that you consider adding a requirement that an employee notify his employer of any significant change in his physical condition. Otherwise, a conscientious employer, like Braswell, simply cannot control the employee's exposure to conditions likely to result in injury and disability. The need for a provision such as this is especially acute at present when general environmental hazards are so great.

In closing, I would like to repeat our appreciation for your interest in our views, and thank Mr. Carroll of your staff for his courtesy and competence in working with us. Please let me know if we can be of further assistance to the Subcommittee.

Very truly yours,

WL Gardner

William L. Gardner

WLG/tkd

NORTH ATLANTIC PORTS ASSOCIATION
incorporated

President
WILLIAM J. TORPEY
Fall River Port Authority
State Pier
Fall River, Mass. 02721
(617) 674-5707

1st Vice President
WILLIAM J. BROWN
I.T.O. Corporation of Baltimore
Dundalk Marine Terminal
Baltimore, Maryland 21222
(301) 285-6500

2nd Vice President
ALFRED HAMMON
Port Authority of N.Y./N.J.
1 World Trade Center
New York, N.Y. 10048
(212) 466-7001

Secretary
G. FRED DiBONA, JR.
Philadelphia Port Corporation
940 Public Ledger Bldg.
Philadelphia, Pa. 19106
(215) 925-9301

Treasurer
ARTHUR W. JACOCKS
Virginia Port Authority
1600 Maritime Tower
Norfolk, Virginia 23510
(804) 622-1671

Immediate Past President
MARTIN C. PILSCH, JR.
Massachusetts Port Authority
99 High Street
Boston, Mass. 02110

General Counsel
FRANCIS A. SCANLAN, ESQ.
2900 Two Girard Plaza
Philadelphia, Pa. 19102

Executive Director
CHESTER H. GOURLEY
36 Evergreen Road
Reading, Mass. 01867
(617) 944-1277

Directors:
A. EDWARD LANGLOIS
Portland, Maine
E. ASHTON IRVINE, M.N.I.
ROBERT N. NELSON
Providence, R.I.
PHILIP TARASOVIC
New Haven, Conn.
JOEL D. SCHINE
Bridgeport, Conn.
ARTHUR J. BOYLE
MICHAEL E. MAHER
ANTHONY J. TOZZOLI
New York, N.Y.
ROBERT L. PETTEGREW
Camden, N.J.
JOHN J. GIBBONS
Philadelphia, Pa.
EUGENE G. NEARY
Wilmington, Del.
JAMES F. HOGAN
JOHN T. MENZIES, III
Baltimore, Md.
J. ROBERT BRAY
Norfolk, Virginia

NAPA RESOLUTION IN SUPPORT OF HR.-24 AND. S-1182, BILLS TO BRING EQUITABLE REFORM TO THE LONGSHOREMEN'S AND HARBOR WORKERS COMPENSATION ACT.

WHEREAS: the public and private terminal operators of the North Atlantic range are faced with serious cost and competitive problems from Canada and other port ranges, and;

WHEREAS: since the passage of the Longshoremen's and Harbor Workers Compensation Act Amendment of 1972 there has been an alarming increase in the costs of longshoreman insurance, if obtainable at all, under the Act ranging up to $87.26 per $100.00 of payroll costs, and;

WHEREAS: the Supreme Court of the United States has since considered and failed to clarify the scope of the Longshoremen's and Harbor Workers Compensation Act of 1972, and;

WHEREAS: recent Senate hearings have pointed to serious false claims and instances of corruption in the administration of the Longshoremen's and Harbor Workers Compensation Act of 1972, and;

WHEREAS: it is essential to the economic well-being and future financial stability of the ports of the North Atlantic range to effectuate just and meaningful reform of the Longshoremen's and Harbor Workers Compensation Act of 1972, and;

WHEREAS: HR-24 and S-1182 achieve the goal of just and meaningful reform of the Longshoremen's and Harbor Workers Compensation Act of 1972 in the national interest for labor, management, shippers, the consumer and the ports of the North Atlantic range and in other ports of the United States; now

"To encourage and promote the development of foreign and domestic commerce through the ports of the U.S. North Atlantic Range"

THEREFORE, BE IT RESOLVED: that the North Atlantic Ports Association, Inc. in annual meeting assembled, endorses HR-24 and S-1182 and urges the Congress of the United States to quickly enact this legislation, and;

BE IT FURTHER RESOLVED: that copies of this Resolution be sent to the President of the United States, the Secretary of Labor, the President Pro Tempore of the Senate and Speaker of the House of Representatives, Senators Nunn and Nickols and Congressman Erlenborn, the Chairmen of the appropriate Committees of Congress, the National Association of Stevedores, and appropriate maritime media publications.

ADOPTED:

Providence, Rhode Island
June 11, 1981

William J. Torpey

William J. Torpey
President.

JUN 16 1981

IOWA INDUSTRIAL COMMISSIONER

507 - 10th STREET
DES MOINES, IOWA 50319

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

WORKERS COMPENSATION SERVICE
TELEPHONE (515) 281-8934

June 12, 1981

Senator Don Nickles
6327 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Nickles:

I have been asked to inform you as to our experience in computing workers' compensation benefits in Iowa using the 80% of spendable earnings concept. Iowa has been under this system since 1973. Although at first we thought it would be a difficult procedure, we have experienced no problems in being able to establish an individual's benefit level by merely programing the tax tables into the computer. After that we need merely enter the gross weekly wage, marital status and number of exemptions to which an individual is entitled and the computer will automatically calculate the rate.

We further print a workers' compensation benefit schedule on an annual basis so that the general public will know what rate is applicable.

Very truly yours,

Robert C Landess
ROBERT C. LANDESS
Industrial Commissioner

RCL/sd

NATIONAL INSURANCE PRODUCERS CONFERENCE

Independent Insurance Agents of America, Inc.
National Association of Casualty and Surety Agents
National Association of Insurance Brokers, Inc.
National Association of Professional Insurance Agents
National Association of Surety Bond Producers, Inc.

JUN 16 1981

June 16, 1981

The Honorable Don Nickles
Chairman
Senate Labor Subcommittee
Senate Labor & Human Resources Committee
411 Russell Senate Office Building
Washington, D.C. 20510

Re: Reform of the Longshoremen's and
Harbor Workers' Compensation Act,
S. 1182 and H.R. 25

Dear Chairman Nickles:

The National Insurance Producers Conference (NIPC), an umbrella group representing the five leading national insurance agent/broker associations*, actively supports legislation to reform the Longshoremen's and Harbor Workers' Compensation Act, S. 1182 and H.R. 25. The Act authorizes the United States Department of Labor (DOL) to regulate, administer, enforce and adjudicate a Federal workers' compensation program which, when originally enacted in 1927, was formed to compensate those who worked along U.S. waterways and were not covered by the various state workers' compensation programs.

Since the Act's enactment, this Federal compensation program has been amended numerous times and, resulting from the Act's 1972 amendments, has created, for all practical purposes, an uninsurable risk. The Act's coverage has gone well beyond that ever intended by its drafters. It provides compensation to workers or survivors who are neither injured doing work nor have died from causes related to harbor work or the waterways.

Accordingly, insurance markets have become restricted; insurance is provided primarily through residual markets or self-insurance. Insurance companies and their reinsurers have not been able to predict with any accuracy the cost under this Act. Thus, they can neither properly price their product nor put aside adequate reserves for future losses. Fewer and fewer companies sell in the voluntary market.

---

*Independent Insurance Agents of America, Inc.
National Association of Casualty & Surety Agents
National Association of Insurance Brokers, Inc.
National Association of Professional Insurance Agents
National Association of Surety Bond Producers, Inc.

The 1972 amendments increased the tax-free benefits to very high levels; benefits equal 200 percent of the national average weekly wage. The amendments also provided for an annual escalation of these benefits and has extended survivor benefits to cover deaths which were not job-related. Some beneficiaries will take in more money under this compensation program than they would have received as wage earners. Thus, too often there is no incentive to return to work or to pursue rehabilitation. Injured workers, who, if properly supervised by DOL, would be rehabilitated and returned to the work place, are instead out of work, receiving tax-free benefits with an unpredictable annual escalation based on increases in the national average weekly wage.

Another major problem under the Act has been the liberal court interpretation of the Act's jurisdiction. The Act provides benefits to workers never intended by its authors. Inland workers and over-the-water workers, like off-shore oil rig workers, are covered by the Act which in 1927 was intended only for longshoremen and harbor workers. In 1928 the District of Columbia was placed under the Act as well because no other plan was available to them. The District is currently trying to get out from under its jurisdiction.

These unpredictable and liberal interpretations of the Act as amended in 1972, its high benefits levels and its poor administration under DOL have all contributed to skyrocketing insurance costs. Benefits under the Act are so high that employers have gone out of business. They could no longer afford to insure their risk and stay in operation. The annual cost of coverage for one general stevedore in New York State, for example, is now over $21,000, more than the typical American earns in one year. Therefore, the Act has had a direct impact on employment. Most employers have also passed the high cost on to the consumer through the price of their product. U.S. manufacturers have been at a competitive disadvantage with those who do not face the cost burdens of the Longshoremen's Act.

NIPC members support fair and equitable compensation to injured workers. However, we do not advocate that compensation programs be a substitute for unemployment benefits or be used as pension plans. The Longshoremen's Act needs reform. It should be amended to: (1) tighten its jurisdiction, (2) bring balance to the system of benefits, (3) reform administration of the Act under DOL, and (4) assure a competitive insurance market. We hope that your committee will support reform of the Act and urge expeditious passage of S. 1182 and H.R. 25. We would appreciate your making this letter a part of the formal record of this committee.

Respectfully yours,

Bert Leavitt

Bert J. Leavitt, Chairman

cc: Senate Labor Committee
Chuck Carroll
Steven Sacher

REINSURANCE ASSOCIATION OF AMERICA
1025 CONNECTICUT AVENUE, N. W. WASHINGTON, D. C. 20036 202/293-3335

June 4, 1981 JUN [illegible]

Honorable Don Nickles, Chairman
Subcommittee on Labor
Committee on Labor & Human Resources
4320 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Mr. Chairman:

This letter is submitted by the Reinsurance Association of America (RAA) with the request that it be made a part of the record of your Subcommittee's hearing on S. 1182, legislation to amend the Longshoremen's and Harbor Workers' Compensation Act. The RAA is a trade association of property and casualty reinsurance companies whose members write premiums in excess of $4.5 billion annually.

Reinsurance, the principal activity of all our member companies, is the business of one insurer assuming all or part of a risk originally undertaken by another insurer. Unlike primary insurance companies, reinsurers do not deal directly with the general public. The principal technical functions of reinsurance are to provide insurers with capacity enabling them to write policies in larger amounts than otherwise could be written; to share the financial burden of reserves attendant to the growth of premium income; and, generally, to reduce an insurer's net liability to amounts considered appropriate for the insurer's capital and surplus.

While forms of reinsurance treaties vary widely depending on their objective, the principal type of arrangement in the workers' compensation line is excess of loss reinsurance. Under such a treaty, the primary insurer, subject to a specified limit, would be indemnified against the amount of loss in excess of a specified retention.

During the course of testimony before your Subcommittee, witnesses representing various segments of the insurance industry will describe major defects in the Longshoremen's

THERON J. STRENK
CHAIRMAN
ANTON J. C. HASSING
VICE CHAIRMAN
CHARLES W. HAVENS III
PRESIDENT
N. DAVID THOMPSON
SECRETARY-TREASURER
JAMES M. SHAMBERGER
VICE PRESIDENT-GOVERNMENT RELATIONS
FRANKLIN W. NUTTER
GENERAL COUNSEL

and Harbor Workers' Compensation Act and its administration. While all those factors affect reinsurers to some extent, reinsurers find the impact of inflation and escalation of benefits on a very slowly developing line of business to be particularly onerous. It is for this reason that we are bringing to your attention problems with workers' compensation in general and the added feature of unlimited benefit escalation of this program.

Workers' compensation claims are difficult for primary carriers to evaluate and properly reserve because they may take one, two, three or more years to determine the extent of loss. Reinsurers, however, are in a far worse position. A study by the RAA indicates that only 20% of ultimate losses incurred are known at the end of the first year. By the second year known losses increase to less than 30%, and by the fourth year about 45% of ultimate losses are known. By the seventh year about 60% are known. This pattern of loss development makes it extremely difficult to price coverages accurately for future losses which may have a somewhat different development--historically it has been worse.

Another special consideration for reinsurers relates to the leveraged effect of inflation. While, over the long run, a primary company must respond to total limits inflation, the excess of loss reinsurer must take extra precautions. The reinsurer writing excess of loss business actually gets a double penalty during an inflationary period as the amount of loss per claim goes up and as the number of claims that reach the excess level goes up.

To understand the effect of a change in the amount of a claim on the primary insurer and the reinsurer, assume a primary carrier retained the first $50,000 of each loss and that a loss of $75,000 was incurred. The reinsurer would pay $25,000 of the loss. Now assume an inflation rate of 10%. The next year the $75,000 loss becomes $82,500, while the primary company still pays $50,000, and the reinsurer will pay $32,500, an increase of 30%.

This example illustrates the nature of the problem of an excess of loss reinsurer in an inflationary period. To deal with this problem some reinsurers have adopted the use of index clauses which provide for an automatically increased retention based on inflation.

Even beyond this, however, both insurers and reinsurers of coverages written under the Longshoremen's and Harbor Workers' Compensation Act must anticipate the level of annual cost of living increases for benefits provided under the Act. The combination of these factors makes it very difficult to predict ultimate losses. Even when these losses are evaluated as well as possible so as to determine an actuarially sound rate, another problem often arises. Because the cost of the program is high, state regulatory officials sometimes suppress rates with the result that the premium charged is simply inadequate to pay both the primary losses and the reinsurance premium.

Dealing with inflation alone is difficult, but the added aspect of unlimited escalation of benefits makes it virtually impossible to establish the proper rate or obtain an adequate premium to support future losses. Unless action by Congress is taken to limit the future rate of benefit increases, the situation will only worsen and the risks will ultimately become unaffordable.

If we can provide additional information, please let us know.

Sincerely,

James M. Shamberger
Vice President
Government Relations

JMS:mwm

The Federal Administrative Law Judges Conference

424 NATIONAL LAWYERS CLUB
1815 H STREET, N. W.
WASHINGTON, D. C. 20006

OFFICERS

DAVID W. MILLER (FERC)
President

BENJAMIN G. USHER (OSHRC)
First Vice President

JEROME K. SOFFER (SEC)
Second Vice President

FRANK W. VANDERHEYDEN (MARAD)
Treasurer

EDWIN S. BERNSTEIN (FMSHRC)
Secretary

EXECUTIVE COMMITTEE

VICTOR W. PALMER (Agri.)
KENNETH L. TRAVIS (ATF)
RONNIE A. YODER (CAB)
ARTHUR L. SHIPE (CFTC)
ALFRED CHATTERTON (CG)
FRANCIS L. YOUNG (DEA)
HUGH J. DOLAN (DOC)
JOSEPH E. MCGUIRE (DOI)
GEORGE A. FATH (DOL)
LEONARD N. LAWRENCE (DOL)
J. F. GREENE (EPA)
FREDERIC J. COUFAL (FCC)
DANIEL J. DAVIDSON (FDA)
DANIEL M. HEAD (FERC)
GARVIN LEE OLIVER (FLRA)
JOSEPH N. INGOLIA (FMC)
WILLIAM FAUVER (FMSHRC)
THOMAS F. HOWDER (FTC)
GEORGE H. SAMUELS (HHR)
JOHN G. UNDERWOOD (HHR)
MICHAEL W. WERTH (HHR)
MARTIN LINSKY (HUD)
PETER A. FITZPATRICK (ICC)
JAMES J. O'MEARA, JR. (ICC)
DONALD K. DUVALL (ITC)
WILLIAM G. SPRUILL (MARAD)
JOHN J. MCCARTHY (MSPB)
ROBERT A. GIANNASI (NLRB)
IVAN SMITH (NRC)
WILLIAM E. FOWLER (NTSB)
IRVING SOMMER (OSHRC)
RALPH HUNTER TRACY (SEC)
QUENTIN E. GRANT (USPS)

June 15, 1981

Honorable Orrin G. Hatch
Chairman, Labor and Human Resources
Dirkson Senate Office Building
Room 4230
Washington, D.C. 20510

Re: S.1182, Longshore Amendments

Dear Chairman Hatch:

The attached testimony is submitted on behalf of the Federal Administrative Law Judges Conference. If you or your staff have any questions or if it desirable that I present this testimony in person, please contact me at 436-8870.

Respectivefully submitted,

Benjamin G Usher
BENJAMIN G. USHER
President

TESTIMONY OF

BENJAMIN G. USHER

ADMINISTRATIVE LAW JUDGE

PRESIDENT, FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE

This testimony is submitted on behalf of the Federal Administrative Law Judges Conference, an association whose membership includes most of the 1,150 administrative law judges in the executive departments and regulatory agencies. All but one of the administrative law judges at the Department of Labor are members of the Conference. The goals of our organization include improvement of the fairness and efficiency of the regulatory process. Because administrative law judges are entrusted by the Administrative Procedure Act with ensuring fair hearings for all parties involved in proceedings before the Government, it is imperative that the environment in which they work provide sufficient protection for their independence and tenure. It is for these purposes that the Conference has been active over the years in encouraging efforts to improve this environment for its members.

In the Conference's view, S. 1182 contains a provision which will have a potentially adverse impact upon the tenure of administrative law judges now sitting at the Department of Labor as well as reducing the significance of the decisions which those judges now make.

For over thirty-five years the Administrative Procedure Act's guarantee of a fair hearing and an impartial decision on the record have depended upon judicial career tenure for hearing officers and, more recently, administrative law judges (with removal only for good cause as determined by the Merit Systems Protection Board, after notice and hearing). In fact, career tenure has probably been the single most important feature of the job that has attracted so many very capable senior attorneys, state court judges and other members of the legal profession to accept these positions. Certainly it is not the salary levels, which are far below positions with comparable responsibility in the legal community which attracted these men and women. For these reasons, the Conference has a vital interest in any proposed legislation or reorganization plan that would abolish a substantial number of positions in any department or agency.

S.1182, as presently drafted, would create an independent Benefits Review Board with authority to hire administrative law judges. It is not clear whether or not this legislation would cover the Federal Black Lung Benefits Act, as amended, because that law incorporates provisions of the Longshoremen's and Harbor Workers' Compensation Act for the adjudication of claims for benefits. The two Federal compensation programs are so interrelated, particularly in the adjudication procedures, that it is difficult to envision the creation of a separate Board for only the Longshore program. Certainly the volume of Longshore cases alone would not justify a separate Board.

Assuming that both Longshore and Black Lung benefit claims would be adjudicated under the provisions of S.1182, these cases represent over 75 percent of the caseload of the Department's Office of Administrative Law Judges. S.1182 would transfer the work of about 65 administrative law judges from the Department to the new Benefits Review Baord, but not the judges who are presently trying these cases. Without some provisions in the legislation mandating the transfer of current DOL administrative law judges, the new Board would be under no obligation to hire any of them.

The appointment of administrative law judges is vested by S.1182 in the Chairman of the Board. He could pick and choose among the Department's present administrative law judges, or hire none at all. Under the current Office of Personnel Management procedures, any administrative law judge within the federal government could be hired by the Chairman without consideration of tenure, competitive grade or preferential status. Moreover, candidates for administrative law judge positions could be hired from the competitive register at OPM.

At present, there would not be sufficient work remaining at the Department of Labor's Office of Administrative Law Judges to retain all of the judges who hear Longshore and Black Lung cases. Any who are not transferred to the new Board would be vulnerable to any Reduction in Force in the office.

It is not clear to the Conference exactly what role the new Board would play in the adjudicatory process under the proposed legislation. In the existing adjudicatory procedure the decision of the administrative law judge is final with an absolute right of appeal by the parties. The courts have determined that the Benefits Review Board's scope of review is limited to a "substantial evidence" test or a clearly erroneous application of the law.

As presently implemented, the trial functions of Longshore Act adjudication are performed by the Office of Administrative Law Judges with the Board acting solely as an appellate body. Although S.1182 requires that the Board "provide the parties with an opportunity for a hearing on the record before an adminstrative law judge" it also appears to establish a procedure for the Board to ". . . hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Board considers appropriate." The Board's final order is required to be based upon the hearing record, but, as presently drafted, the record could be supplemented by the Board. This would destroy the necessary separation of the trial and appellate functions and would impair the efficiency of the adjudicatory system.

The Conference strongly supports giving greater finality to the decisions of administrative law judges as a way of avoiding the waste and delay present in most agency review systems. The present law in the Federal Longshore and Black Lung programs is a model of the kind of finality which is given for most court decisions and which the Conference would like to see provided for administrative law judge decisions. Several possible interpretations of S.1182 would reduce the finality of these decisions and, in our opinion, would be a step backward.

In conclusion, the Conference urges the Committee to: (1) amend S.1182 to require the Board to give the preference to existing DOL administrative law judges when it initially fills those positions; and (2) to keep separate the trial and appellate functions to retain the present law with regard to the finality of administrative law judge decisions as being an efficient procedure to guarantee a fair and meaningful proceeding and yet avoid the excessive and costly review permitted by a discretionary review procedure.

Benjamin G Usher
BENJAMIN G. USHER
President, FALJC

PROFESSIONAL INSURANCE AGENTS
600 PENNSYLVANIA AVE., S.E., SUITE 202, WASHINGTON, D. C. 20003
(202) 547-4422 (703) 836-9340

June 19, 1981

The Honorable Don Nickles
Chairman
Subcommittee on Labor
Committee on Labor and Human Resources
United States Senate

Dear Senator Nickles:

Enclosed is a statement of position regarding S. 1182, "The Longshoremen's and Harbor Workers' Compensation Act Amendments of 1981", and related issues by the National Association of Professional Insurance Agents (PIA). We respectfully request that this statement be entered in the published record of the hearings conducted by your Subcommittee on this proposed legislation.

Please note that PIA is a member of the National Insurance Producers Conference (NIPC) panel that will testify at the Subcommittee's June 23rd hearings on S. 1182. Contained in the above mentioned position statement is an analysis of the problems experienced by insurance producers that are the result of the 1972 amendments to the Act. Included therein is a narrative by Daniel J. Blum, a member of PIA who will represent our Association on the NIPC panel.

If you have any questions or comments, please contact Charles W. Wegner, Jr., PIA's Director of Federal Affairs.

Sincerely,

Bert J. Leavitt

Bert J. Leavitt, CPCU, CIC, FMS
President

Joseph F. Ackert

Joseph F. Ackert, FMS
Chairman,
Federal Affairs Committee

A NATIONAL ASSOCIATION PROTECTING YOUR FUTURE

Statement By

The National Association of

Professional Insurance Agents

This is a statement of position in regard to S. 1182, "Longshoremen's and Harbor Workers' Compensation Act Amendments of 1981" by the National Association of Professional Insurance Agents (PIA).

PIA is a national trade association representing more than 36,000 independent property and casualty insurance agents in all 50 States, Puerto Rico, the Virgin Islands and Canada. PIA sincerely believes that American workers and their dependents have a right to expect prompt, adequate compensation for job related injuries or illnesses. Since the turn of the century, the fulfillment of this essential social protection for workers has been the responsibility of the legislatures of the several States which have enacted worker compensation laws to provide equitable employee reinbursement for lost wages when they have the misfortune to suffer a workplace injury. The legal theory behind such programs rests on the proposition that law suits against employers for monetary damages by employees injured on the job frequently provided an inadequate remedy because of the common law defenses, such as contributory negligence, that may be available to employers in these cases. Consequently, some workers recovered full damages in court, while many others lost and received no compensation whatsoever for their affliction.

Eventually, all states enacted a legislative trade-off to alleviate this problem. Workers compensation laws provided ememployees with assured no-fault statutory benefits for workplace injury or illness that provided a livable portion of their lost wages and covered the medical expenses incurred. This eliminated the need to resort to litigation and guaranteed adequate compensation. On the other side, employers were protected from the possibility of losing at law and paying substantial full tort damages but lost their right to raise legal defenses involving worker fault.

State workers' compensation laws generally cover only those injuries and medical disorders that are reasonably related to employment. They provide temporary income maintenance and are structured to enhance rehabilitation while providing incentives to induce workers to return to work as their condition improves. Workers' compensation programs are generally limited to these criteria and have proved to be an accepted function of State public policy.

The Subcommittee is holding hearings on the Longshoremen's and Harbor Workers' Compensation Act (Act) and the amendments thereto proposed in S. 1182 because the criteria in the previous paragraph defining the scope of a sound workers' compensation statute somehow got sidetracked by the current federal program. The Longshore Act was originally enacted by the Congress in 1927 to cover longshoremen and harbor workers who sustained job related injuries and were not covered by State workers compensation because the Judicial Branch had held that state coverage did not apply on the navigable waters of the United States. The 1927 Act covered the workers mentioned in its title and jurisdiction was limited to jobs on the waters edge.

Over the years, problems with the Act had developed in the areas of inadequate benefit levels, and from judicial interpretations pertaining to shipowners and employers of longshoremen.

The U.S. Supreme Court had permitted third party liability and indemnification actions where injured longshoremen could sue the ship owner for damages on a "seaworthiness" doctrine. The shipowner could then sue the longshoreman's employer for indemnification. This as a practical matter allowed an employee to indirectly sue his employer and thus obviated the no-fault principle that is fundamental to any workers' compensation program.

A package of amendments to remedy these problems were introduced in the 92nd Congress. The bill somehow got caught in the legislative crunch at the end of the Second Session and the final result was something that went far beyond correcting the benefit shortcomings and restoring the no-fault concept. The poorly drafted 1972 Amendments spawned a legal and administrative quagmire that has fostered endless litigation, caused insurance coverage and related costs to skyrocket, and established a number of concepts like life insurance, pension and punitive damages that have no place in workers' compensation programs. The end result has been a wholesale abuse of this federal program at considerable unnecessary cost to society.

The current Act's life insurance provisions provide survivors benefits for permanent total and permanent partial disabilities even if the workers death is totally unrelated to employment. No statutory cap exists on these tax-free death benefits that are subject to an annual cost of living escalator that is potentially unlimited.

The pension provisions give workers, with some form of permanent disability, benefits for life. This compensation which can be as high as $456.24 per week, is double the national average weekly wage and is tax-free with no limit on annual increases to match the inflation rate.

What amounts to punitive damages, as a practical matter, are awarded with disturbing regularity by Labor Department officials charged with administering the Act. Generous awards are granted for partial disabilities and employees who subsequently return to work full-time at their previous or even higher wages continue to draw benefits.

These concepts are foreign to conventional workers' compensation but the shortcomings of the 1972 Amendments do not stop here. The Act contains nothing to encourage any worker to return to the job because there are no mandatory rehabilitation provisions therein. Under the tax-bracket creep caused by inflation that makes workers subject to higher income tax rates with each raise in income, the Act's tax-free inflation indexed benefits often exceed the take home pay earned prior to injury. This is a blatant disincentive for any beneficiary to go back to work and human nature being what it is, they respond accordingly.

One of the major problems caused by the 1972 Amendments and the issue that impacts most adversely on PIA members is the imprecise and inconclusive language that extended the Act's jurisdiction. This aspect has been commented upon extensively by Chairman Nickles in the May 14, 1981 Congressional Record. The end result is that coverage now encompasses an ever expanding range of economic activity far beyond the traditional scope of work performed by longshoremen on the docks and harbor workers.

Unclear jurisdictional limits have prompted the Labor Department to suggest that it will try and extend coverage to as many workers as possible. The upshot of the jurisdictional controversy has been endless litigation which has somehow done little to alleviate the jurisdictional crisis. Indeed, the highest court in the land has criticized the Act's jurisdictional mess on several occasions. The most telling negative comment came from Mr. Justice Brennan last year when he called the Act a, "jurisdictional monstrosity".[1] From what PIA has been able to gather researching this issue, a speculation regarding jurisdiction can well be made that if employers and their workers conduct a business somewhat near the water or it is somehow connected with maritime shipping or boats of any size, such employees may be covered by the Longshore Act. If someone has doubts, let them go to court for a determination. Admittedly, this is a rather vague description of who is covered but it sums up the problem that at this point in time no one is really certain where Federal coverage ends or State coverage begins.

This has led to a situation where in some instances employees are covered by both the Longshore Act and state workers' compensation. They can and do file claims under both systems and end up selecting the highest benefits available. Though legal, this is an expensive duplication of bureaucratic effort.

Since the 1972 Amendments went into effect, the number of claims soared by 185% in the first five years because benefits suddenly became easy to obtain, were bountious in comparison to

---

1. Sun Ship, Inc. v. Pennsylvania, et.al., 447 U.S. 715 (1980)

other workers' compensation systems, contained no incentives to get workers back on the job and greatly expanded the scope of coverage to include a multitude of workers whose jobs really have nothing to do with longshoring or harbor working. By any objective analysis, the 1972 provisions have changed a somewhat responsible Federal workers' compensation program that filled a limited void in state coverage into a new and ever-expanding quasi pension, life insurance and social welfare scheme.

The Act's benefits are financed by covered employers either purchasing commercial insurance, obtaining insurance by utilizing more costly and less effective assigned risk coverage, or self insurance if the firm is large enough to bear the risk.

The fundamental premise underlying insurance is the need to spread the risk over a sufficiently large number of policyholders while being able to project with a fair degree of accuracy the risk exposure that is being financed by a given premium rate and volume. Under the Longshore Act these preconditions for insurance no longer exist because no one knows who is currently covered or may be covered in the future. Insurers also have no method of determining the dollar amount of future benefits because of the unlimited inflation indexing hereinvolved. Unpredictability is the watchword here and when insurance companies and their reinsurers cannot determine their risk exposure they will withdraw from the market. Longshore Act employer liabilities, in some areas of the country, are now as a matter of basic economics, uninsurable in the voluntary market. Where coverage is available the premiums are prohibitively expensive. Longshore Act premiums can be as high as 50% of each dollar of payroll compared to a 1.5% average for state workers' compensation rates. Something is very wrong here as these comparisons indicate.

The casualty insurance industry like any other business must make a profit on the product it sells and the current and future prospects for writing profitable Longshore coverage appear to be rather bleak and this situation will continue to get worse unless the Act is amended to bring it into the realm of a cost effective workers' compensation scheme financed by reasonable insurance premiums.

PIA members produce for the insurance companies that currently write or have written Longshore Act coverage. If market conditions are such that insurers refuse to provide such insurance, or employers are forced to resort to self insurance because they cannot afford the premium rates and go it alone hoping to cover any liability with in-house assets, then an aggregate property/casualty insurance industry economic contraction is experienced. The insurance agent's book of business is reduced as this segment of the market contracts. Where Longshore coverage is still available, agents experience considerable difficulty trying to obtain policies for clients at an affordable price. This situation is becoming progressively more difficult both in terms of obtaining insurance and having to deal with very frustrated clients who quite properly fear in many instances that Longshore liability premiums may eventually force them out of business.

The Act has become a financial albatross around the neck of all business entities that are caught within its clutches while it provides windfall benefits to workers and their dependents who are in a position to take advantage of this situation. The adverse impact of this law reaches such a significant spectrum of the economy that those suffering under its yoke have formed a Longshore Action Committtee to seek essential legislative reforms as the only way out of this deteriorating situation. The group represents insurance companies and their agent and broker producers, the ship and boat building industry, aviation and trucking concerns, port and terminal authorities, a municipal board of trade, fuel and energy interests, navigation firms, construction and contracting groups and chambers of commerce. The very scope of this membership clearly reveals how far the 1972 amendments have strayed from the original purpose of the Act in 1927.

PIA is a member of this dedicated Committee and wholeheartedly supports its efforts to secure the passage of remedial legislation such as S. 1182 sponsored by the Subcommittee's distinquished Chairman, Senator Nickles and H.R. 25 sponsored by Congressman Erlenborn in the House of Representatives.

PIA represents a major block of insurance agents that still produce Longshore Act coverage in some form. National PIA contacted members around the country who have considerable personal experience in this area and posed series of questions regarding the impact of the 1972 Amendments. The following are a selection of their responses. This represents a Longshore Act perspective from insurance agents who are small businessmen that will clearly point out the need for the enactment of S. 1182 by the 97th Congress.

In response to the aforementioned series of questions, a New England insurance agency - Norton Associates (181 Park Row, Brunswick, Maine 04011) had this to say:

Q1: For what types of firms (nature of the business) do you produce longshore coverage?

A: "Boat builders, commercial fishermen, marinas, industrial waterfront business."

Q2: Please state how long you have been in the insurance agency business and how much longshore business do you write?

A: "Sixteen years, $100,000 volume in Longshore."

Q3: The Senate Permanent Investigation Subcommittee found the Act invites fraud and exaggerated claims that organized crime and labor racketeers use as a tool of economic coercion against covered employers. Please detail your knowledge of these concerns.

A: "In Maine, this has not been of primary concern."

Q4: Since PIA agents service clients' policies as claims arise, what has been your experience in the volume of claims for benefits before and after the 1972 amendments to this act?

A: "Far broader in scope and benefits."

Q5: Have employers in your area been forced into assigned risk programs because of the 1972 amendments?

A: "Yes."

Q6: Have the 1972 amendments forced employers to resort to self-insurance (to the obvious detriment of the insuring public and industry)?

A: "It is one reason here in Maine."

Q7: Is there much industry competition for longshore business?

A: "None."

Q8: If you have any knowledge of the high cost to employers caused by the 1972 amendments, please detail.

A: "One thousand percent rate increase in Maine."

Q9: Senator Don Nickles has suggested that, due to the 1972 amendment, employers' liability has been virtually uninsurable. Where it is available, it is almost unaffordable for most covered firms. Insurance companies and reinsurers are withdrawing from longshore markets because no one knows who is covered or how much benefits will increase in the future. Insurers and self-insurers cannot predict risk exposure. Please comment on the Senator's observations from your personal experience with the difficulty of obtaining insurance coverage for those clients requiring the longshore coverage.

A: "The biggest problem is the vagueness and inconsistency by Companies as to coverage, deficiencies and applications."

The second response is from Daniel J. Blum, an insurance agent who will represent PIA on the insurance producer panel testifying before the Labor Subcommittee on Tuesday, June 23rd. See attached letter and answers that follow.

RECEIVED JUN 5 1981

the INSURANCE HOUSE
POST OFFICE BOX 52848 • LAFAYETTE, LOUISIANA 70505
TELEPHONE
318/233-7330

DAN BLUM
TY HOPKINS
TAYLOR HOPKINS, C.L.U.

June 4, 1981

Ms. Patricia A. Borowski, CPIW
Director of Administration
for Government and Industry Affairs
Professional Insurance Agents
400 N. Washington St.
Alexandria, VA. 22314

RE: The Longshoremen's and Harbor Workers'
Compensation Act

Dear Pat:

Enclosed please find a response to your letter of May 28, 1981 concerning problems encountered in our area of the country involving the Longshoremen and Harbor Workers' Compensation Act. Please overlook the fact that this narrative may not be in perfect grammatical form however in an attempt to get something back to you as quickly as possible I am sending it to you this way.

I would like to elaborate a little on our conversation of Tuesday, June 2, 1981 concerning the somewhat unique situation that we may have in this area regarding the Longshoremen and Harbor Workers' Act. As I explained to you, we have in south Louisiana the longshore exposure predominately on fixed platforms offshore. The proposed changes to the present Act appear to define the Longshoremen and Harbor Workers' exposure in such a way as to eliminate the possibility of an employee being able to collect under the Act when he is working on a fixed platform, unless he is performing one of those functions specifically outlined in the Act. If one of the intentions of this legislation is to specifically define those job classifications which fall under the Act then I believe we would see a reopening of the competitive market place for the types of exposures that we have in Louisiana.

Please give me a call if you have any questions about anything that I have sent you. I had a meeting with several of our local PIA members concerning this subject earlier this week, and I can assure you that this proposed legislation is very exciting to us.

With the exception of the week of June 28th I can be at your disposal for whatever assistance you might feel that I can lend.

Sincerely,

The Insurance House, Inc.

Dan

Dan Blum

DB:jb

ANSWERS/BLUM

1. We provide coverage predominantly for service contractors to the oil industry. These firms perform such operations as welding, painting, sandblasting, roustabout crews, inspectors, consulting engineers, drilling contractors, shipbuilders, and pumpers and gaugers.

2. I have been in the insurance agency business since October 1971 and prior to that time spent five years as a Commercial Lines Underwriter with The Travelers Ins. Company.

   In 1981 The Insurance House will write approximately $3,000,000 Casualty/Property volume of which $1,500,000 will be Workers' Compensation. Of this total of Workers' Compensation, approximately 75% will represent accounts which have some Longshore and Harbor Workers exposure.

3. I do not have any first hand knowledge of exaggerated claims involving organized crime and labor racketeers. I do understand, however, that this is a problem, mainly in the Stevedoring classifications.

4. Having only been in the agency business since late 1971, I really can't make a comparision of claim activity prior to the 1972 Amendments to the Act. However, I can state that in the last nine years claims involving Longshore exposures are generally more difficult to handle, more time consuming, and much more costly to both the agent and the insured. We seem to spend an inordinate amount of time working on these claims, which may drag on for several years.

5. Employers have been forced into Assigned Risk Programs because of the 1972 Amendments. In fact, we do not have any accounts which involve a Longshore exposure which are being written by any of our standard companies on a voluntary basis. All Longshore business that we presently write is either through the Assigned Risk Plan or through self-insured type programs which we administer for our insureds.

6. We do have three large accounts presently on self-insured programs. These programs are not fully self-insured, but rather have the equivalent of a $35,000 deductible per claim. Insurance coverage up to $10,000,000 is purchased above that deductible and we have an arrangement with a broker who handles the claims and administers the insured's funds for payment of claims.

7. I would say that there is not much industry competition, if any, for Longshore business. The attitude taken by the companies that we represent, which have been very active in this market, in the past, such as Hartford and Travelers, is that they will not consider any account whatsoever that has either a Longshoremen's and Harbor Workers or a maritime exposure.

8. We certainly do have knowledge of increased costs to employers caused by the 1972 Amendments. Due to those amendments, there are no longer any standard markets in Louisiana to my knowledge,

that provide Longshore and Harbor Workers coverage except for those accounts which have a very incidental or "If Any" exposure. I understand that Reliance and U.S.F.&G. will still write coverage for those type accounts, however, those are the only companies that I know of that are still doing so. The 1972 Amendments have really caused the Longshore exposure to be taken out of a competitive insurance marketplace and relegated almost exclusively to the inefficiencies of the Assigned Risk Plan. The Plan itself is not inefficient but the manner in which the carriers handle the assignment is inefficient. In most cases the insurance companies are understaffed in those departments which handle the Assigned Risk Workers' Compensation business and consequently those accounts are treated as stepchildren. Unless we are fortunate to receive an assignment with a company that we represent, we are absolutely at the mercy of the carrier. When we do have an assignment with a company that we represent we can normally get good service simply because we have developed a relationship with the underwriters and the field office staff so that the service is generally comparable to the same service that we are receiving on business written on a voluntary basis.

As I mentioned before, we write three large accounts through a self-insured type program, and if it were not for this type program being available, I suspect that at least two of these firms would no longer be in business. These two both perform labor contact services to major oil companies offshore and the annual cost through the self-insured program is approximately $350,000 each. I would say that if these two accounts were placed in the markets that are available today, the cost of each of them would approach $750,000 which means that neither of these firms would be able to stay in business.

The pricing of the Longshore coverage in itself is not a problem, even in the Assigned Risk, but the fact that due to the 1972 Amendments and the unwillingness of carriers to provide coverage on a voluntary basis the pricing of the Jones Act or Maritime coverage has become prohibitive. We, in the past, were able to negotiate with our carriers the maritime rate but now that coverage is in the Assigned Risk Plan and we find ourselves in a position where negotiation is impossible since these insurance companies are not writing the business because they want to, but because they are being forced to.

9. Probably answered No. 9 in No. 8, however, I feel that the companies in our area who have a Longshore and Maritime exposure find themselves totally at the mercy of the Assigned Risk Plan and non-standard markets in order to obtain their coverage. The result of this situation is detrimental to both the independent insurance agent and those clients for whom he provides Lonshoremen's and Harbor Workers Coverage.

It is detrimental to the Agent since he is having to incur a great deal more overhead in order to place the coverage and service it, and is doing so at commissions which are less than

those which would be received if he would be placing the coverage through his standard markets.

It is a detriment to the insured since his bottom line costs for his insurance program is greater than it would be if the Longshore coverage were available on a competitive basis.

The third example is a copy of a letter from Mark A. Foley, Jr., a PIA insurance agent from Boston, Massachusetts.

HERTERICH / FOLEY

BONDS & INSURANCE

RECEIVED JUN [illegible]

June 4, 1981

Ms. Patricia A. Borowski, CPIW, Director
Administration of Government
and Industry Affairs
Professional Insurance Agents
400 N. Washington Street
Alexandria, VA 22314

RE: The Longshoremen's and Harbor Workers'
Compensation Act

Dear Ms. Borowski:

PIA - New England requested that I respond to your memorandum of May 28, 1981. This Agency services a rather substantial amount of contracting accounts, who from time to time have undertaken certain work projects involving LS & HW exposures; thusly requiring us to secure the coverage. This has proven to be a very difficult task indeed; and speaking quite candidly, more times than often, the LS & HW extension was provided by the Underwriter in an accommodation basis upon the overall contracting account. Up until the past three or four years the LS & HW extension was readily available in the market place, and it is more than appropriate, if not absolutely essential, to provide this protection on an automatic basis under the Contractor's Basic Workers' Compensation policy.

Current market conditions involve an extremely tight situation for placement of LS & HW primarily caused by the circumstances outlined in your memorandum of May 28, 1981. Personally, I think you have been very kind in expressing the problem as an imperfection in the Act, as I think it would be hard to argue that the present situation is nothing short of chaotic.

I fully support your reform package and would submit that such changes would not only provide relief for the direct Longshoremen's market, but also would clearly improve conditions for the construction industry with respect to work projects involving LS & HW exposures. I would very much appreciate being informed of the results of these hearings.

Yours very truly,

Mark Foley

MARK A. FOLEY, JR.

MAF, JR./lcf

The closing sample is a letter copy from John M. Parsons, a PIA member from Providence, Rhode Island. In a few short paragraphs he adequately sums up the crux of the Longshore Act insurance problems. (See following)

MORTON SMITH, INC.
GENERAL INSURANCE AGENTS

P.O. BOX 2385 · 500 DORIS BUILDING
PROVIDENCE, RHODE ISLAND 02906
TELEPHONE (401) 861-6800 · TELEGRAMS: SMITHINC
TELEX · 92 · 7751

June 5, 1981

Ms. Patricia A. Borowski, CPIW
Director
Administration for Government
and Industry Affairs
Professional Insurance Agents
400 N. Washington Street
Alexandria, Va. 22314

RE: The Longshoremen's and Harbor Workers' Compensation Act

Dear Ms. Borowski:

In reply to your blanket letter of May 28th, we find that the New England Marine Trade Association is endorsing Rep. Erlenborn's Bill No. H.R.25 and hope to have a companion introduced in the Senate.

Most, if not all, of the excesses in the present act are corrected and hopefully it will be passed since the present act has served to corrupt Workers' Compensation acts in various states.

It is difficult to place Longshoremen's and Harbor Workers' Compensation because the loss record is so rotten, and this of course does influence the acquisition of any account in which it is involved.

If you would like to discuss this first-hand, please call me at the above number any weekday morning.

Sincerely,

MORTON SMITH, INC.

John M. Parsons
Vice President

The enactment of S. 1182 will correct the serious problems caused by the 1972 Amendments. Of special interest to PIA are the following provisions:

1. The 3% annual cap on death and permanent total disabilities benefits is contained in Section 8 (b).
2. Section 4 will change the payment level from the current 66 and 2/3 of the average weekly wage to 80% of spendable earnings - a financial incentive to return to work.
3. Under Sections 4, 7 and 10 the maximum payable benefit limitation will cover death and disability benefits.

   Workers' disabilities that are partial but permanent, or total for a temporary period would have their benefits end at retirement.

   There will be a cap of 6 years of benefits placed on permanent partial disabilities.
4. The unrelated death benefit will be repealed by Section 6.
5. Sections 2 and 3 clearly define the essential terms used to establish which workers are covered and the areas where they work.

These provisions, along with others not cited, will greatly reduce the cost of Longshore Act coverage, make such costs predictable and end the jurisdictional uncertainty. They will help restore this program and should make it again generally insurable in the voluntary market.

PIA supports S. 1182 and commends Senators Nickles and Nunn for introducing this vital measure. It is the sincere hope of our membership that it will move expeditiously through the legislative process.

NACSA
NATIONAL ASSOCIATION of
CASUALTY & SURETY AGENTS
5454 WISCONSIN AVENUE, SUITE 1625
CHEVY CHASE, MD 20015
(301) 986-4166

PRESIDENT
Gerald R. Cassidy
4701 Sangamore Road
Washington, DC 20016

VICE PRESIDENT
Philip A. Wilde, Jr., CPCU
Hartford, CT

SECRETARY
William D. Kientz
Columbus, OH

TREASURER
Allen H. Carruth
Houston, TX

BOARD OF DIRECTORS
Paul N. Borman
Fargo, ND
Frank C. Brooks
Baltimore, MD
*William E. Burch
Chicago, IL
John L. Clarke
Charlotte, NC
Vincent J. Como
Bridgeport, CT
*Charles C. Counselman, Jr.
Baltimore, MD
*John F. Doetzer, CPCU
Baltimore, MD
Edwin A. Flinn, Jr.
San Francisco, CA
John C. Glandon, CPCU
Columbus, OH
L. Graham Haynie, Jr.
Roanoke, Va
H. Hollis Hunnewell
Boston, MA
William T. Huntley, III, CPCU
Atlanta, GA
*Clifton C. Inge
Mobile, AL
A.L. Jagoe
Washington, DC
Joseph E. Johnson, CPCU
Briarcliff Manor, NY
Kennett R. Kendall, Jr., CPCU
Rochester, NH
John A. Kohler, CPCU
Minneapolis, MN
Baylor Landrum, CPCU
Louisville, KY
Edward F. LeBreton, Jr.
New Orleans, LA
James R. McEldowney
Oklahoma City, OK
A.P. Marshall, Jr.
Wheeling, WV
Arthur L. Owen, CPCU
Dallas, TX
Henry S. Payson
Portland, ME
William M. Pitcher
Hunt Valley, MD
*John F. Russell, CPCU
Binghamton, NY
A. Park Shaw, Jr.
Scottsdale, AZ
*John M. Sommer
Denver, CO
*Sidney A. Stewart, Jr., CPCU
Memphis, TN
*Timothy N. Thoelecke
Chicago, IL
Lawrence A. Tomlinson, Jr.
Charlotte, NC
*J. Bransford Wallace
Nashville, TN
William P. Wallace, CPCU
St. Petersburg, FL
*Richard J. Weghorn
New York, NY

**Executive Committee*

EXECUTIVE VICE PRESIDENT
Bruce T. Wallace

EXECUTIVE DIRECTOR
J. Martin Huber

ASSOCIATE DIRECTOR
Everett Howard

GOVERNMENT AFFAIRS DIRECTOR
Joan H. Albert

GENERAL/LEGISLATIVE COUNSEL
Pierson, Ball & Dowd
Washington, DC

JUN 1

June 19, 1981

The Honorable Don Nickles
Chairman, Senate Labor Subcommittee
Senate Labor & Human Resources Committee
411 Russell Senate Office Building
Washington, D.C. 20510

RE: Reform of the Longshoremen's and Harbor Workers' Compensation Act, S. 1182 and H.R. 25

Dear Chairman Nickles:

The National Association of Casualty and Surety Agents is an association of larger commercial, property/casualty insurance agencies and brokerage firms. Our members are involved in placing insurance coverages for the majority of business and industry throughout the United States, and as such are aware of serious problems under the Federal Longshoremen's and Harbor Workers' Compensation Act.

We applaud the interest that you and Senator Nunn have in reforming this Act and offer our active support and endorsement of S. 1182.

We respectfully submit the following comments and ask that they be included in the record of the Hearings of this Committee.

We believe the Federal Longshoremen's and Harbor Workers' Compensation Act, particularly as a result of the 1972 amendments, has become an unreasonable and oppressive burden for those businesses whose employees fall under the Act and has made it difficult and, at times, impossible to insure this risk.

When Congress amended this Act in 1972 it intended to make certain improvements which we believe have been misinterpreted and their purpose distorted creating a jurisdictional monstrosity and administrative chaos which must be addressed promptly.

Jurisdiction has been extended to include workers already covered under other state laws and to those whose occupations were never intended for coverage under the Act. At times jurisdiction is claimed by an injured worker, otherwise covered under a state law, who claims jurisdiction simply because his employer may have an

Casualty/Surety/Fire/Marine
1913-OUR SIXTY-EIGHTH YEAR-1981

office in Washington, D.C., or some insignificant operation in Washington, D.C., in no way affecting the injured.[1]

Inadequate monitoring of medical treatment, including indiscriminate and frequently unwarranted referrals between physicians, has permitted runaway medical costs. Rehabilitation efforts are ineffective or non-existent resulting in abuse of the law and disincentives to return to work.

Payments of benefits often exceed the after-tax income received by the worker prior to injury since no other income such as social security or other pension is integrated or even acknowledged. Some injureds are granted permanent, partial disability payments and returned to their former job at full pay while continuing to collect such benefits.

At times payments are made based upon the most obscure presumption of causal relationship of injury or for death unrelated to employment.

Because of the inability to predict future losses, insurance companies frequently reserve these cases in six and seven figures. Such reserves and payments made for medical expenses and lost time under the Act have caused insurance costs to become excessive. Businesses required to insure these exposures have their competitive position impaired or destroyed causing loss of business and loss of employees jobs.

We urge Congress to act to: (1) Clarify jurisdiction similar to S.1182 including specific definition of those employees who are to be considered Longshoremen and Harbor Workers; (2) Establish realistic benefit levels, i.e., capping unpredictable escalation, and (3) Require an overhaul of the Department of Labor administration of the Act specifically including the identification of a group of Administrative Law Judges who would specialize in Longshoremen and Harbor Worker cases.[2]

We sincerely hope your Committee will join you in supporting the needed reform of the Act and urge expeditious passage of S.1182.

Sincerely,

Gerald K. Cassidy
President

GKC:hzb
cc: Ms. Joan Albert
Director, Government Affairs
National Association of Casualty
and Surety Agents

---

[1] The Workers' Compensation Act of the District of Columbia is the Federal Longshoremen's and Harbor Workers' Compensation Act. The District of Columbia is attempting to enact its own law to remove itself from the burdens of Longshoremen's and Harbor Workers'.

[2] At present Administrative Law Judges are required to handle cases under perhaps fifty different laws and, therefore, rulings often indicate their unfamiliarity with Longshoremen's and Harbor Workers' Act.

STATEMENT
on
S.1182
THE LONGSHOREMEN'S AND HARBOR WORKERS'
COMPENSATION ACT AMENDMENTS OF 1981
for submission to the
SUBCOMMITTEE ON LABOR
of the
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
for the
CHAMBER OF COMMERCE OF THE UNITED STATES
by
Eric J. Oxfeld*
June 23, 1981

The Chamber of Commerce of the United States is pleased to have the opportunity to comment in support of S.1182, the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1981.

The U.S. Chamber is the world's largest business federation, composed of more than 146,000 members, including 142,000 business firms, 2,700 state and local chambers of commerce in the United States and abroad, and 1,300 trade and professional associations. The Chamber is the publisher of an annual report on the workers' compensation system entitled Analysis of Workers' Compensation Laws.

The serious flaws of the Longshore Act are having an adverse effect on every business member of the Chamber. As employers, many Chamber members now are required to provide workers' compensation coverage for their employees under the Longshoremen's and Harbor Workers' Compensation Act (the Longshore Act), and many other members could find themselves in the same circumstance as a result of judicial decisions expanding the Act's jurisdiction. Furthermore, because the Longshore Act frequently is touted as a model for state workers' compensation programs, every business member of the Chamber has an interest in the Act. In addition, the cost of insuring Longshore risks has become so great that its impact on the economy is of national concern.

---

*Employee Benefits Attorney and Editor of Analysis of Workers' Compensation Laws, Chamber of Commerce of the United States

The Chamber, which has long been working to maintain a fair and effective workers' compensation system, therefore urges Congress to enact S.1182, which would make some sorely needed amendments to the Longshore Act (see Attachment 1).

CHAMBER POSITION

The Chamber shares the Committee's hopes for a modern workers' compensation system for the maritime industry and for the District of Columbia, a system that meets the needs of today's work environments. The Longshoremen's and Harbor Workers' Compensation Act, however, does not meet those needs as the Act presently is worded, interpreted, and administered.

The purposes of the Act are to provide fair, certain, adequate, and prompt job-disability benefits to individuals employed in maritime industries -- longshoremen and harbor workers -- and a few groups of workers not otherwise covered by state workers' compensation laws.

As a result of oversights by legislative draftsmen and a misguided notion of fairness and adequacy when the Act was drafted, coupled with maladministration, judicial misinterpretation, and continual double-digit inflation, the Act has deteriorated from a "model" law to a national scandal. Despite commendable efforts by the Labor Department to reduce the backlog of pending claims and to improve over-all administration, the Longshore program remains notorious for being dilatory in the delivery of benefits, ineffective in weeding out questionable claims, and exorbitantly expensive for employers. These problems have convinced us that if the current situation is left unchanged, some employers may be forced to go elsewhere (i.e., to Canada or Mexico), go "bare" (i.e., fail to insure), or go under (i.e., out of business).

American maritime industries (and other inland employers caught in the undertow of murky Longshore jurisdiction) feel the immediate pinch as their operating expenses spiral upward and their business is diverted to Canada and Mexico. In addition, the flaws of the Longshore Act have an effect that is felt far inland from the water's edge. American agricultural producers and manufacturers are at a competitive disadvantage in world trade because of astronomical handling costs added to the price of their goods. American consumers must pay more for imports. American workers are affected by declining job opportunities.

None of this should be news to members of Congress. The Chamber and other employer representatives repeatedly have requested Congress to take action. The General Accounting Office (GAO) in 1976 issued a 68 page report to the Senate Labor Committee criticizing the administration of the Longshore program. The Subcommittee on Compensation, Health and Safety of the House Committee on Education and Labor built up an exhaustive record of the need for change by holding 8 days of oversight hearings in 1977 and 9 days in 1978, supplemented by additional days of hearings in 1979 and 1980 before the Subcommittee on Labor Standards. The full Senate Labor and Human Resources Committee held hearings on Longshore reform last year.

Numerous bills seeking to correct shortcomings in the Longshore Act have been introduced in both houses of Congress by Democrats and Republicans. Without being exhaustive, the list includes:

H.R. 8878 (Miller, 1977); S. 2020 (Cranston, 1977);
H.R. 12154 (Leggett, 1978); H.R. 13593 (Ruppe, 1978);
H.R. 2448 (Erlenborn, 1979); S. 1201 (Cranston, 1979);
S. 1511 (Nelson, 1979), and H.R. 7610 (Erlenborn, 1980).

Despite the long roster of criticisms, we do believe that the Act still contains the basis for an effective compensation program, and that it can be amended to correct its deficiencies. We urge Congress to address the urgent problems in the Act and its administration without further delay.

BUSINESS SUPPORT FOR WORKERS' COMPENSATION

The U. S. Chamber has long been vitally interested in assuring the effectiveness of our workers' compensation programs in general and the federal Longshoremen's and Harbor Workers' Compensation Act in particular. As the record clearly demonstrates, workers' compensation -- a nearly 100 year-old concept -- has proven to be a reasonably efficient method of protecting employers, motivating job-place safety and prompting the rehabilitation of injured workers. Because we believe that no satisfactory alternative is available and that the basically sound workers' compensation system must be strengthened, we have long urged our membership to work for and support needed improvements in both state and federal job-injury laws.

The Longshore Act is an integral part of the workers' compensation system. It serves as the workers' compensation law for the District of Columbia as well as for maritime industries and should be considered the equivalent of a state program. In many respects, however, when compared with the state laws the Act is sadly lacking. Every year the state legislatures work on improving their programs, but the Act has not benefited from periodic legislative improvements (see Attachment 2). The federal response to criticism of the Longshore program has been to make a bad situation worse through poor administration and faulty judicial opinions.

LEGISLATIVE HISTORY

Congress enacted the original Longshoremen's and Harbor Workers' Compensation Act in 1927 to provide job injury protection for certain maritime employees working over navigable waters. A federal law was required because the Supreme Court had ruled that the states lacked jurisdiction in such cases. The following year Congress extended the Act to cover private employment in the District of Columbia. The Act also covers civilian employees on overseas military post exchanges, service clubs, and the like (Nonappropriated Fund Instrumentalities Act, 1952),and employees of firms exploring the outer continental shelf (Outer Continental Shelf Lands Act, 1953). Administration of the Act was placed in the Office of Workers' Compensation Programs (OWCP) of the U.S. Department of Labor.

The most recent statutory extension of coverage, in 1972, applied to persons working in dock areas engaged in loading or unloading of vessels, and persons engaged in shipbuilding or ship repair work on land adjacent to navigable waters.

This last extension was part of a package of amendments that raised the maximum weekly benefit to 200% of the national average weekly wage (NAWW) and set the minimum benefit at 50% of NAWW. The amendments also provided unlimited annual cost of living increases payable to persons receiving permanent total disability or death benefits; this cost-of-living adjustment (or COLA) was indexed to increases in NAWW. Employees were granted the right to choose their own physician.

There have been no further amendments since 1972, but there have been wholesale revisions of the Act through federal judicial interpretation. The courts have broadened Longshore jurisdiction far beyond Congress' intent. The Act has been held to cover the pleasure boat industry, marinas, summer camps, and persons working far from any navigable water.

Perhaps the most astonishing judicial opinion, however, was the Supreme Court's decision in February, 1979, in Rasmussen v. Director of OWCP. In Rasmussen the Court brushed aside 50 years of practice under the Act to hold that no maximum applies to death benefits.

In 1980, the Court carried on its tradition of questionable decisions. In Sun Ship, Inc. v. Pennsylvania the Court held that a longshoreman can collect benefits under the Longshore Act and under a state program. And in Thomas v. Washington Gas Light Co. the Court ruled that an individual who had exhausted benefits under the Virginia law could then file and continue receiving benefits in Washington, D.C.

Despite unsatisfactory interpretations of the Act by the Supreme Court, Congress has refused to take action.

Not so the District of Columbia. Last year the Council of the District of Columbia voted to replace the Longshore law with a new program to be administered by the District government, effective in October, 1981. We think it noteworthy that the one jurisdiction where the Longshore Act operates as the equivalent of a state law has done everything in its power to escape from it.

COST EXPLOSION

Employers' costs under the Act have risen six times faster than wages over the past 10 years. In the shipbuilding industry, for example, costs to employers have risen 851% from 1970 to 1980 -- contrasted to average wage increases of 124% over the same period. Although workers' compensation costs for the nation as a whole have been increasing about twice as fast as inflation, the Longshore program stands out as by far the most expensive workers' compensation system in the country.

The enormous difference in insurance rates is demonstrated by comparing rates for employees covered by the Longshore Act with rates for occupations of similar hazard and pay covered by state workers' compensation laws. For example, in 1981 the annual cost under the Longshore Act for insuring one longshoreman is $21,000 (annual wage $24,000). The annual cost under the New York law for a non-longshore freight handling worker is only $3,370; $1,042 for a police officer; $1,254 for a fireman. For a worker employed in pneumatic tunneling -- one of the most hazardous occupations -- the cost is $9,019.

A similar disparity may be observed when comparing Longshore Act rates with corresponding rates in Canadian ports. U.S. stevedores at Atlantic and Great Lakes ports operate with Longshore Act rates varying from $25 to $87 per $100 of payroll -- while the Canadian rates are only $2.50 to $13.

The effect of exorbitant Longshore costs is predictable. New businesses and small employers may find the additional burden of Longshore Act insurance too great to handle. Businesses located in Washington, D.C., may find substantial cost savings by relocating across the District line. Shippers may find it cheaper to ship through Canada or Mexico.

An obvious result is fewer jobs available. A less obvious result is the impact on the price of goods and services. In the District of Columbia, where the median sales price of a new house is over $90,000, workers' compensation costs for a $90,000 house are almost $4,000 higher than in Maryland or Virginia, according to statistics compiled by the Greater Washington Board of Trade.

Another example of the pervasive effect of high Longshore costs is the competitive disadvantage for exporters. Longshore insurance can add 25% to the cost of shipping perishable produce, which must be handled manually. Even though the American product may be of superior quality, foreign competitors have a substantial competitive edge.

SERIOUS DEFECTS IN LONGSHORE ACT

The 1979 Cooper* study of the Longshore program confirmed that "very liberal benefits" coupled with "a propensity to make and exaggerate claims" are causing "serious problems." Specifically, employers are experiencing severe problems with benefits, the physician selection process, the lack of vocational rehabilitation, persistent maladministration, and a perplexing set of jurisdictional guidelines. It is not hard to understand why the Longshore program is so expensive.

I. Inadequacies of Benefits System

Longshore Act benefits are the most generous, relative to wages of covered employees, of any workers' compensation system in the continental United States (see Attachment 3). Benefits close to or in excess of pre-injury take-home pay invite abuse by workers who have little incentive to return to their jobs after recovery. Indeed, Senate hearings on organized crime have pinpointed lucrative Longshore benefits as an encouragement for outright fraud.

---

*Cooper and Company, Insurance Arrangements under the Longshoremen's and Harbor Workers' Compensation Act, Phase I Draft Final Report (Stamford: 1979).

job-related disability or death. These benefits are provided at the employer's expense, tax-free to the recipient. The wage replacement ratio used almost universally is two-thirds of pre-injury wages, which originally was thought to provide an adequate level of income without creating disincentives to return to work upon recovery.

At present, however, a replacement ratio of two-thirds results in a windfall for higher paid workers. Inflation, the progressive income tax, and the advent of the dual income family are the reasons -- as family income increases, workers are bumped up to higher tax brackets, and two-thirds of gross wages tax-free can easily exceed pre-injury take-home pay. With other economic savings factored in -- the cost of transportation, meals, etc. -- the incentive to abuse the system is high indeed. When benefits from other sources -- i.e., Social Security, pensions, sick leave, and so on -- are paid as well, Longshore benefits can become a bonanza for not working.

- Maximum benefits - The formula for computing the Longshore maximum is far out of line compared with benefit maximums under the state workers' compensation laws. As a dollar amount and as a percentage of weekly pay it is too high relative to the earnings of covered workers. Futhermore, it is based on a figure that has little connection to the earnings of longshoremen, and it escalates automatically in a way that over-compensates for increases in their cost of living.

Currently the maximum weekly benefit under the Longshore Act is $456.24, which represents the benefit paid to an individual whose annual income is $35,586.72. The maximum escalates automatically every October because it is indexed to 200% of the national average weekly wage. Only one state, Alaska, has a hi her dollar amount for its maximum weekly benefit. The average dollar maximum under the state workers' compensation laws is $228.

Most state maximums are based on the cost of living for claimants covered by the state law, derived from statewide average wages. The Longshore maximum, however, is based on the national average wage, which has little connection to average earnings of longshoremen on a statewide or even nationwide basis. For example, in 1979 statewide average annual pay ranged from $10,410 to $20,973. Although no data are available on longshoremen's earnings on a statewide basis, it can be presumed that their annual earnings are equally affected by their state of residence.

The "ideal" level for a maximum benefit is much disputed, although traditionally the norm has been the amount that will replace 80% of take-home pay for 80% of claimants, which typically works out to 80% of statewide average weekly wages (SAWW). We note that the states typically set their maximums between 66 2/3% and 100% of SAWW, with the average approximately 90%. Four out of five states use an automatic escalator to increase their maximums as average wages increase. A better understanding of the inflationary impact of automatic escalators, however, is indicated by the fact that last year two jurisdictions with maximums higher than 100% of SAWW froze their escalators until wages catch up.

- No maximum on death benefits- The Supreme Court, in its wisdom, has ruled in Rasmussen v. Director of OWCP that contrary to 50 years of practice under the Longshore Act, there is no upper limit on death benefits. The surviving dependents, therefore, receive weekly benefits equal to two-thirds of pre-accident weekly wages, tax-free, no matter how much the deceased worker was earning. No state system pays death benefits without any maximum whatsoever. The absence of any upper limit makes prediction of insurance losses highly speculative, pushing costs up to cover "worst case" situations.

- Unlimited COLA - The Longshore Act is one of a very few workers' compensation systems that automatically grant benefit increases to persons already receiving benefits, to accommodate changes in the cost of living. The cost-of-living adjustment (COLA) is pegged to increases in the national average weekly wage. In order to insure COLA benefits properly, an insurer must not only predict accident rates and wage levels, but actually estimate the rate of inflation over 15 or 25 years -- a skill that government economists themselves have yet to master. Since a worker's wages do not automatically increase with the cost of living, a COLA departs from the principle of workers' compensation that an injured worker should receive benefits as a replacement for wages. Moreover, the COLA accelerates inflation because the wage replacement ratio is not applied to the amount of the increase. At the very least, a cap should be placed on the COLA.

- Benefits paid without wage loss - Benefits continue to be awarded for nonscheduled permanent partial disability based on anatomical medical ratings and alleged loss of future earning capacity, although the worker has returned to work at full wages -- and despite the fact that the 1972 amendments to the Act were supposed to preclude such awards.

- Benefits paid to persons who refuse work - Benefits for income loss are payable regardless of the fact that the recipient is on strike or even in jail. This situation makes no sense -- it amounts to an employer subsidy for people who choose not to work.

- Unrelated death benefits - Death benefits are payable to survivors of a disabled worker who dies from causes unrelated to the disability. These unrelated death benefits are nothing but life insurance and have no place in a workers' compensation system. Employers should pay benefits for deaths that are job-related, including deaths that arise out of a job-related disability. But the employer's responsibility should terminate if the death has no connection to the disability.

II. The Physician Selection Process Encourages Abuse

The 1972 amendments gave workers the right to choose their own physician. This seemingly innocuous "right" is responsible for many abuses, because it is difficult for administrators to supervise the medical care given to injured workers. Employers should be given the opportunity to have an injured worker examined by a doctor selected by the employer, unless the request clearly is unwarranted. Without an effective control over medical services, patients' physicians may have an incentive to make diagnoses other than on an objective basis.

III. Failure to Require Vocational Rehabilitation Means Unnecessary Work Absences

Under the Act, there is no penalty for refusal of vocational rehabilitation by a disabled employee unable to perform his or her pre-injury job. Workers' compensation should concentrate on restoring a worker's wage-earning capacity through vocational rehabilitation or retraining wherever possible. Studies prove that a sense of self-reliance plays an important part in speeding physical and emotional recovery; rehabilitation allows an early return to productivity and is integral to developing a positive self-identity. A worker who refuses rehabilitation, preferring to draw benefits instead of working, is a burden to family and society. The Act should be amended to include a provision suspending income benefits for the period during which rehabilitation benefits are refused. Where retraining is offered, it must be in occupations for which there are reasonable job opportunities.

IV. Maladministration Has Compounded the Other Problems

The General Accounting Office, in its lengthy report on administration of the Act, found that (1) OWCP's national office fails to give guidance to the district offices, causing inconsistencies in procedure from region to region; and (2) the national office lacks effective monitoring of district offices. As a result, "OWCP district offices are not adequately reviewing and monitoring the employers' and their insurance carriers' payments of compensation [and] not levying civil penalties...for failing to meet reporting and other requirements of the act." The GAO discovered that contested cases are not given prompt attention, there is no time frame for completing the hearing process, and inadequate efforts are made to provide vocational rehabilitation. In fairness to injured workers and to employers, the Labor Department should be required to resolve all cases in a timely fashion, and to give proper emphasis to vocational rehabilitation of all persons with permanent disabilities.

V. Federal Jurisdiction Is Far Too Broad

A. Restore State Jurisdiction Over Non-Longshoring Employments

Although it is an extreme example, to a certain extent the Longshore program is representative of problems also faced by employers in the state workers' compensation programs. In one respect, however, the Longshore Act has caused a headache for employers quite unlike any to be found in the state programs -- the perplexing matter of federal jurisdiction.

Federal jurisdiction under the Longshore Act is a hodgepodge of maritime and inland employments. The extraordinary vagueness of the statutory language and its amendments, interpretations, and applications has produced a plethora of litigation. Moreover, confusion as to which employers are required to obtain Longshore coverage has created pressure for higher insurance rates because of the greater magnitude of potential losses where employers are insured.

The Chamber has long maintained that workers' compensation should be a state program, fashioned by each state legislature to meet the particular needs of its own citizens and administered by a state agency answerable to those citizens. This fundamental principle applies to persons presently or prospectively covered by the Longshore Act.

Congress enacted the Longshoremen's and Harbor Workers' Compensation Act to remedy the situation created by the Supreme Court of the United states in Southern Pacific Co v. Jensen. In the Jensen case the Court refused to allow New York to enforce its workmen's compensation statute insofar as it applied to a worker killed unloading cargo from a steamship onto a pier. Noting that maritime law is constitutionally the "law of the land" and, therefore, supreme over inconsistent state law, the majority of the sharply divided (5-4) Court found that New York's law was in conflict with general principles of maritime law. The majority's misapplication of maritime law to cover actions against a person (rather than a vessel) is ably explained in Justice Oliver Wendell Holmes' dissenting opinion. We do not believe that the Court could reach the same conclusion in Jensen if the same facts were before the Court today. While we feel that the Court went astray in issuing the Jensen decision, we certainly are not suggesting that Congress lacked constitutional authority to enact the Longshore Act. What we do wish to remind this Subcommittee is that there is no constitutional reason for that law to apply to the many types of employment to which it has been extended, whether by statute, court decision, or administrative fiat. We note that the states are able to cover maritime workers under their unemployment compensation laws without doing violence to maritime law, federal supremacy, or the Constitution. If there must be a federal workers' compensation law for longshoremen and harbor workers, we urge that its jurisdiction be as narrow as possible.

Congress originally passed the Longshore Act to protect workers left outside the protections of the state workers' compensation laws. With respect to longshoremen and harbor workers, this situation was the result of the faulty Jensen decision; with respect to private employment in the District of Columbia, Congress alone had jurisdiction in 1927. In the absence of any constitutional necessity for Congress to legislate for longshoremen, in light of the District's having been granted home rule authority, and because persons employed in the pleasure boat industry, marinas, and summer camps already are protected by state laws, the historical necessity for the present Longshore Act needs to be reconsidered.

The key jurisdictional changes necessary at this time are to relinquish federal jurisdiction over the following:

- District of Columbia - Congress enacted the District of Columbia Workmen's Compensation Act in 1928. Rather than fashioning a new law suited to the District's needs, Congress merely tacked the District onto the existing Longshore program, which was tailored to the specific needs of maritime industries. Maritime employment in Washington, D.C., is negligible to nonexistent, and it no longer makes sense -- indeed if it ever did -- for the District to operate under the Longshore Act. The high costs of Longshore insurance have hit small businesses in the District particularly hard. Now that Congress has granted the District home rule, the elected government of the District of Columbia can take responsibility for operating a workers' compensation program. The Council of the District of Columbia has enacted legislation creating a workers' compensation act for the District, as a substitute for the Longshore Act, effective in October, 1981.

- Pleasure craft and small fishing boat industries - The Act, as now interpreted, has been construed to apply to workers engaged in the manufacture, repair, servicing, and sale of recreational and fishing boats. It is incongruous to lump these employees, who are not engaged in any work-related high risk functions, with longshoremen and harbor workers, who are engaged in heavy activities. As Senator Cranston has pointed out, these businesses are "normally, completely, and appropriately" covered by state workers' compensation laws. The incidence of injuries in non-longshoring businesses is very low -- but the high cost of Longshore insurance is contributing to layoffs of workers. In fact, more workdays are lost because of layoffs than from work injuries.

- Marinas, summer camps, and marine museums - Marinas, summer camps, and marine museums have also been placed under the Longshore Act. As a rule these industries experience few major injuries and are adequately covered by state workers' compensation programs. In fact, the American Camping Association states that there is no record of a claim ever being filed from a youth camp in the 1[illegible] years camps have been under the Longshore Act.

- Persons working inland who are not subject to the special hazards of longshoring - The Longshore Act has been expanded from coverage of persons working over water to include persons working near water. This expansion includes office workers, construction workers and truck drivers -- persons who cannot be construed as engaging in maritime employment. There is no compelling reason for these employees to be covered by the Longshore Act, when state law already provides coverage.

B. Who Should Continue To Be Under The Act

The Longshoremen's and Harbor Workers' Compensation Act should apply only to those persons named in the title of the Act -- longshoremen and harbor workers. Within that category, because of the special hazards, we would include ship repairmen, ship builders, and ship breakers. These are the occupations that logically fall within the purview of maritime employment, if there is a need for a federal program of job disability benefits for maritime workers.

VIABILITY OF LONGSHORE SYSTEM

As onerous as the high costs of Longshore coverage are now, the confusion under the present system has more alarming potential. Then-Senator Gaylord Nelson, in remarks to the 96th Congress pointed out that the "Uncertainty, unpredictability, and ambiguity" of the Longshore Act have made insurance companies reluctant to write coverage at any price. The number of companies willing to write coverage is dwindling. Only a few are left. If the trend continues, employers who cannot self-insure will be forced out of business or risk financial ruin for themselves and their employees. The Cooper study concluded that "the issue of uncertainty in jurisdiction is extremely threatening to the viability of the whole system."

REMEDIES

The preceeding is merely a brief outline of the rapidly deteriorating Longshore program. The solution is speedy enactment of S.1182. This bill clearly defines jurisdiction -- excluding employments never intended to be covered by the Longshore Act, and restricting coverage to vessel loading and unloading on the docks. Without cutting benefits for existing claimants, it redefines the benefit formula to eliminate over-compensation causing disincentives to return to work. It places reasonable limits on the use of physicians, and makes the cost of insuring Longshore risks more predictable.

FURTHER REFINEMENTS

A few additional refinements would improve the bill.

- Benefits should be based on annual income. Many workers in seasonal industries do not work for a full year, and as a result they receive higher wages for weeks they do work. Calculating benefits based on wages for weeks worked, therefore, may result in over-compensation. For example, a worker may earn $20,000 a year in a seasonal industry, working only 40 weeks a year. Average weekly wages are $500 for weeks worked, but only $384 for all weeks.

- The maximum benefit should should be keyed to the state benefit maximum where the claimant resides or where the injury occurs. Longshoremen's wages are included in the statewide average wage calculation, which is based on wages paid to workers covered by unemployment insurance (97% of all workers, including longshoremen). The uniform maximum under the current law overcompensates most covered workers and undercompensates a few, relative to state workers' compensation maximums. A longshoreman should receive the same benefits as a worker covered by a state program who earns the same wages and runs the same risk of job injury. There are precedents for such an approach -- the federal unemployment benefit laws for federal employees and ex-servicemen provide benefits at levels mandated by the state unemployment compensation laws. We also call to the Subcommittee's attention the workers' compensation program for Canadian federal government employees, which provides benefits at levels mandated by Canadian provincial acts.

CONCLUSION

The onerous cost of insuring Longshore risks is hurting American exports and contributing to unemployment and inflation. Nine years after it was last amended, the Longshoremen's and Harbor Workers' Compensation Act is in need of a major overhaul. Many beneficial changes are contained in S. 1182, which can serve as the focus for a comprehensive reform of the Act.

The responsibility for positive action lies with Congress. As Justice Rehnquist observed in the Rasmussen decision, "Congress has put down its pen, and [the Supreme Court] can neither rewrite Congress' words nor call it back 'to cancel half a line.'" Indeed, there is little anyone can do to straighten out the Longshore program until Congress amends the Act.

We commend the Subcommittee on Labor for holding these hearings and thereby taking the first step toward reform. The business community has presented Congress with abundant evidence of the necessity for change. It is vital for the national economic recovery, as well as for the best interests of workers and employers covered by the Longshoremen's and Harbor Workers' Compensation Act, that remedial legislation be enacted without further delay.

ATTACHMENT 1

SUMMARY
of
LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1981
(S.1182)
introduced by
SENATORS DON NICKLES (R-OKLA.) AND SAM NUNN (D-GA.)
May 14, 1981

SECTION 1 - SHORT TITLE

Longshoremen's and Harbor Workers' Compensation Act Amendments of 1981.

SECTION 2 - DEFINITIONS.

Redefines "employee" to include only longshoreman, ship repairman, shipbuilder, ship breaker, or harbor worker, who is engaged in activities directly related to such employment at the time of disability or death. Specifically excludes (1) the master or crew of a vessel, (2) domestic and foreign government employees, (3) administrative and clerical workers, maintenance/repair/security staff, railcar loading/unloading and warehousing personnel, (4) any other individuals not integral to vessel leading/unloading, building or breaking, or (5) individuals providing longshoring services for small vessels (under 65 feet) if covered by state law. (Current definition -- any person engaged in maritime employment, except (1) master or crew of vessel, or (2) individuals performing longshoring services for small vessels (under 18 tons).)

Redefines "employer" as person employing 1 or more employees as redefined. (Current definition -- employer any of whose employees are employed in maritime employment on U.S. navigable waters, including a pier, wharf, drydock, marine railway, etc.)

Redefines "wages" as the money rate (at the time of injury) for services as defined for purposes of withholding federal income tax (current definition includes value of room and board "or similar advantage" received from the employer, plus gratuities paid by someone other than the employer).

Adds definitions of "longshoreman," "harbor worker," "point of rest," etc.

SECTION 3 - EXCLUSIONS FROM COVERAGE

Bars payment of benefits for disability or death caused by intoxication or intentional injury. (Under current law injury must have been caused solely by intoxication or intentional injury.) Bars payment of benefits if worker concealed medical condition on employment application.

SECTION 4 - BENEFITS

Provides that survivors' benefits are subject to the same maximum weekly benefit amount as disability benefits (reverses Supreme Court decision in Rasmussen v. Director of OWCP).

Provides that a claimant's weekly benefit amount may not exceed 80% of spendable earnings. Defines spendable earnings as after-tax wages without allowance for deductions other than personal exemptions.

SECTION 5 - CHOICE OF PHYSICIAN

Requires the Deputy Commissioner to designate a panel of attending physicians from a list submitted by employers. An employee must choose one physician from the panel. Continued treatment by another physician who provided the initial care may be authorized by the Deputy Commissioner.

Referrals to a specialist or consultant at employer expense are permitted only after a written explanation is provided to the employer. Neither employers nor employees are liable for the cost of any medical services unless the physician provides a written report within 10 days after treatment.

At employer request, an independent examination may be conducted by a physcian from an approved list. Evaluation of impairment is to be made according to AMA Guidelines. If there was a preexisting impairment at the time of injury, the independent physician must report (A) whether the permanent impairment after injury is greater than preexisting impairment, and (B) whether the increased impairment is attributable to the injury. Employers have the right to order a second examination if dissatisfied. The prohibition against use of a physician who did work for an employer or insurer within the preceding 2 years is repealed.

SECTION 6 - CASH BENEFITS

Weekly benefits for permanent total disability are 80% of spendable earnings, minus any Social Security benefits. Except where caused by double amputation or loss of both eyes, permanent total disability must be proven by substantial evidence that the employee cannot earn any wages in any employment.

Weekly benefits for temporary total disability are 80% of spendable earnings, payable for the duration of the disability up to prevailing retirement age (as determined by industry and geography).

Permanent partial disability is payable at a weekly rate of 80% of spendable earnings. Unscheduled awards are payable at the rate of 66 2/3% of the difference between pre-injury weekly wages and subsequent wage earning capacity, lasting until prevailing retirement age. Compensation for unscheduled injuries may be decreased at employer request if actual earnings capacity increases, or decreased at employee request if wages decrease.

Compensation for hearing loss will be determined according to measured hearing impairment at specified frequencies, adjusted by age. Benefits are available only if the harmful exposure lasted at least 90 days, and a claim may not be filed until 2 months after the harmful exposure ends. The employer is not liable for proven hearing loss predating the harmful exposure. Provision for 52 weeks of benefits for loss of hearing in one ear and 200 weeks for loss of hearing in both ears is repealed.

Spinal injuries are to be compensated for 312 weeks if there is no evidence of a herniated or ruptured disc.

Authorizes appointment of a defense attorney to represent the Second Injury Fund in apportionment cases.

Benefits for temporary disability may be paid while an employee is in an approved vocational rehabilitation program. No award for permanent disability may be entered until rehab is completed, unless the deputy commissioner determines (or employer and employee agree) that it is unnecessary. Compensation is suspended while rehab is unreasonably refused. Repeals provision for $25 weekly maintenance allowmce.

Defines wage earning capacity as the salary an employee is able to earn. Deletes provision for taking into account "the effect of disability as it may extend into the future." The employee has the burden of proving that the loss of wages resulted from a compensable injury.

Provides that an application for an agreed settlement is deemed approved unless disapproved by a deputy commissioner within 30 days. A settlement must take into account the probability of death, remarriage, and other contingencies, but it may be disapproved only if "grossly inadequate" or "procured by distress." A disapproval may be appealed to the Benefits Review Board.

Specifies that entitlement to compensation for occupational disease is determined by the substantive workers' compensation law of the state where the last exposure occurred.

SECTION 7 - SURVIVORS' BENEFITS

Provides that the maximum survivors' benefit is 80% of spendable earnings.

Repeals provision for payment of survivors' benefits when a claimant receiving permanent total disability benefits dies from causes unrelated to the injury.

SECTION 8 - AVERAGE WEEKLY WAGES; COLA

Limits the annual cost of living increase for permanent total disability or death to 3%.

Defines average weekly wages for a full-year worker at time of injury as 1/52 of total wages for the preceding year. (Current law uses 300 times average daily wage for a 6-day work week and 260 times average daily wage for a 5-day work week, as average annual wages.)

SECTION 9 - NOTICE OF INJURY

Excuses a worker's failure to give timely notice of injury to the employer only if the employer had actual knowledge that the injury is (or is claimed to be) related to employment.

SECTION 10 - DELIVERY OF BENEFITS

Requires the first installment to be delivered within 14 days after the employer's actual knowledge that an injury or death is claimed to be related to employment. Notice that a claim is being controverted is due within 14 days after notice that a claim was filed. (Under existing law time periods run from the date of empoyer's knowledge of injury or death.) Employers have 15 days to deliver benefits (was 10 days) and payment may be by mail (new). Notice that a final payment has been made is due within 30 days (was 16 days).

Repeals provisions for approval of lump sum discharges calculated at the present value of future compensation at a 4% annual discount.

Provides a maximum cash allowance for permanent partial disability not exceeding 312 times the maximum compensation rate. Provides that total weekly cash allowance, plus any other benefits from workers' compensation, unemployment insurance, pensions, or Social Security retirement and disability, may not exceed 80% of spendable earnings.

SECTION 11 - PROCEDURE ON CLAIMS

Requires the Deputy Commissioner to issue a preliminary ruling within 180 days after notice that the claimant's medical condition is stable or that the claimant is working. Notice of the ruling may be sent by personal service or mail and must include a reminder of the right to request a hearing before the Benefits Review Board within 30 days. If a hearing is not requested, the preliminary ruling is final and is not subject to review by an administrative law judge, the Board, or a court.

SECTION 12 - PRESUMPTIONS

Repeals presumptions that a claim is covered by the act, that there was sufficient notice, and that injury was not caused by intoxication or willful intention of the worker or co-worker.

SECTIONS 13-15 - BENEFITS REVIEW BOARD

Establishes the Benefits Review Board as an agency independent of the Labor Department. Members will be named by the President to staggered 6-year terms, upon Senate approval.

Administrative law judges will be hired to review decisions by Deputy Commissioners. A law judge's order must be issued within 30 days after a hearing, and it is final on filing with the Board unless a request for further hearing is filed within 30 days after receipt of the order. Payment of an award (other than periodic cash benefits) is stayed pending a final decision.

The Board may review law judge orders, and Board decisions are effective when filed unless a court appeal is filed.

SECTIONS 16-18 - AUTHORITY OF DEPUTY COMMISSIONER AND LAW JUDGE

Authorizes Deputy Commissioners and Administrative law Judges to administer oaths, issue subpoenas, take testimony, and receive evidence.

SECTION 19 - ATTORNEY FEES

The Benefits Review Board or a court must approve claims for legal services. Repeals provision for attorney fees based only on increase in benefits obtained through legal services.

SECTION 20 - FAILURE TO FILE INJURY REPORTS

The statute of limitations on claims filing does not run until employer/carrier injury reports are filed as required (no substantive change from current law).

SECTION 21 - PENALTIES FOR MISREPRESENTATION

Upgrades to a felony the crime of misrepresentation to obtain benefits, punishable by a fine up to $50,000 or imprisonment up to 5 years, or both (was misdemeanor, fine up to $1,000, imprisonment up to 1 year).

SECTION 22 - THIRD PARTY LIABILITY

Provides that a claimant who recovers a judgment against a third party must reimburse the employer for the cost of all cash and medical benefits. Rights to benefits are terminated if a claimant who recovers from a third party fails to obtain approval of a settlement or give notice of a judgment as required.

SECTION 23-24 - ADMINISTRATION

Prohibits the Secretary of Labor from providing (1) "information and assistance" relating to coverage and benefits and how to process claims, or (2) legal assistance in processing claims. The Secretary may participate in court proceedings only as an intervenor.

SECTION 25 - SAFETY

Repeals provisions for occupational safety for employees covered by the act, administered by the Secretary of Labor.

SECTION 27 - ADMINISTRATIVE COSTS

Repeals provisions for special trust fund held by Treasury to pay administrative expenses, and for payment of staff salaries from appropriations.

SECTION 28 - DISCHARGE FOR FILING FRAUDULENT CLAIMS

Permits employers to fire workers who file fraudulent claims.

SECTION 29 - PROSPECTIVE APPLICATION

Retains current benefit amounts for all claimants receiving benefits on the date of enactment.

Prepared by Eric J. Oxfeld
Employee Benefits Attorney
Chamber of Commerce of USA
Telephone (202) 659-6083

ATTACHMENT 2

WORKERS' COMPENSATION ENACTMENTS BY YEAR

Year	State Workers' Compensation Acts	Longshoremen's Act
1973	175 enactments	0 enactments
1974	150	0
1975	300	0
1976	100	0
1977	300	0
1978	160	0
1979	200	0
1980	175	0
1981 (to date)	140	0
TOTAL	1700	0

Prepared by Eric J. Oxfeld
Employee Benefits Attorney
Chamber of Commerce of USA
Telephone (202) 659-6083

[illegible]

MAXIMUM WEEKLY BENEFIT

TEMPORARY TOTAL DISABILITY -- SINGLE INDIVIDUAL

States Represented on Senate Labor Committee

January 1, 1981

State	Benefit Amount	Maximum Relative to Average Wage of Covered Employee
LONGSHORE ACT	$456.24	169% (200% of national average weekly wage)
ALABAMA	148	66-2/3%
CONNECTICUT	285	100%
FLORIDA	228	100%
INDIANA	140	60% (no escalator)
MASSACHUSETTS	245.48	100%
MICHIGAN	181	90% (effective 1/1/82)
MISSOURI	150	66-2/3% (effective 8/13/81)
NEW HAMPSHIRE	213	100%
NEW JERSEY	199	75%
NORTH CAROLINA	210	100%
OHIO	275	100%
OKLAHOMA	155	66-2/3%
RHODE ISLAND	217	100%
UTAH	230	100%
VERMONT	208	100%
WEST VIRGINIA	262.08	100%
NATIONAL AVERAGE	228.32	90%

Prepared by Eric J. Oxfeld
Employee Benefits Attorney
Chamber of Commerce of USA
Telephone (202) 659-6083

Metal Trades Council of New London County
Affiliated with the Metal Trades Department, AFL-CIO
18 PLEASANT STREET, GROTON, CONNECTICUT 06340
Telephone 445-1277

Thomas D. Kiddy
President

Raymond Sylvia
Vice-President

Joseph W. Messier
Recording Secretary

Joseph Quattromani
Secretary Treasurer

I am Thomas Kiddy, President of the Metal Trades Council, representing some 12,000 thousand workers employed at the General Dynamics Shipyard in Groton, Connecticut.

We in the shipbuilding industry are proud of our products and the contribution we are making to keep America strong. The nation can rest easier and feel safer because our ballistic missile and fast attack submarines provide a strong deterrence to threats or attacks on our country.

But shipbuilding is a dangerous job. Each submarine must be built from the bottom up. We don't have assembly lines where safety inspectors can correct dangerous conditions once and for all. A submarine under construction is like a beehive with thousands of workers each carrying on his own assigned task. We work in poorly ventilated tanks, heated by welding, in air filled with smoke and fumes. We lift heavy parts and walk on icy decks. Many of us fall and break legs and backs.

We are exposed to epoxy paints containing hidden poisons. We are forced to inhale asbestos, fiber glass and lead fumes. As a result of the dangers at work, thousands of us have suffered disabling injuries and thousands more have sickened and died from occupational diseases such as asbestosis, mesothelioma, silicosis, toluene diisocyanate poisoning, lead poisoning, chronic bronchitis, dermatitis, and lung cancer, to name but a few of our problems.

In 1975 and 1976 the Mount Sinai School of Medicine under the leadership of Dr. Irving Selikoff examined about 1000 of us and found that among the various unions, the incidence of lung abnormalities resulting from asbestos alone ranged from 36 percent to 73 percent.

Virtually all of our workers have suffered severe hearing losses from the incredible and literally deafening noise we are exposed to as part of our daily work.

In short, shipbuilding is a dirty, dangerous business, but we are willing to accept these risks because someone must build the quality submarines our Navy needs to keep the peace. All that we ask is that there be a fair, reliable and prompt system of workers compensation to act as a safety net to take care of us when we can't work, to provide us with medical treatment, and to provide for our widows and families when we die from work-related injuries and occupational diseases.

Senate Bill S1182, which would amend the Longshoremen's Act, would not provide such a system. Instead, it would create a callous, mean program designed to force our disabled workers on to welfare, to deny us protection on senseless and cruel technicalities, and in effect, punish us for working for the nation.

If this bill passes, the result will be endless litigation, insufficient benefits for injured workers to survive on, and would result in major public expenditures for increased social security disability benefits and welfare assistance.

The financial incentive the employer now has to make the work place safer would be destroyed and would result in an increased toll of injuries, death and disability.

In short, this bill is a disaster which should be soundly defeated.

I would like to point out the major inequities and problems with this bill. But in doing so, I ask you to remember that my list is not complete. This bill is so bad that with each rereading I find another horror hidden and waiting to attack some poor worker.

Jurisdiction

Before Congress last amended this act in 1972, jurisdiction of the Longshoremen's Act ended at the water's edge. The courts were clogged with cases trying to determine whether workers injured while coming down gangplanks were excluded while those going up were included. Workers found themselves walking in and out of jurisdiction and never knew what kind of protection they had. The Congress correctly chose to reject a system which made payment of compensation depend on the fortuitous circumstance of whether the injury occurred on land or over the water. The Act was amended to provide a uniform compensation system to all workers engaged in maritime employment.

This bill would not only go back to the bad old days, but would be worse.

Jurisdiction would now not even extend with uniformity to injuries occurring over the waters, but would depend on the occupational status of those injured.

We need a fair system to cover all employees, not one which plays Russian Roulette with jurisdiction and coverage. We strongly believe the present jurisdictional requirements should be maintained.

Medical Care

This bill proposes to drastically limit the injured worker's right to select his own doctor, and limit the physician's right to treat his patient. It proposes to permit only doctors selected by the employer to treat injured workers. This short-sighted and

Metal Trades Council of New London County
Affiliated with the Metal Trades Department, AFL-CIO
18 PLEASANT STREET, GROTON, CONNECTICUT 06340
Telephone 445-1277

Thomas D. Kiddy
President

Raymond Sylvia
Vice-President

Joseph W. Messier
Recording Secretary

Joseph Quattromani
Secretary Treasurer

open effort to bias even medical treatment will come back to haunt us all. The worker must have confidence that his doctor has, as his only concern, the prompt treatment and cure of his patient. If passed, this proposal would hinder the rapid recovery of workers and inject suspicion and bias into health care systems.

Compensation Rate

Traditionally, workers' compensation programs have paid benefits to workers based on 2/3 of their average weekly wage. This figure provides an incentive to the worker to return to work, but does not needlessly punish those who are unable to go back to work because of their injuries. The proposal to reduce benefits further to "80% of spendable earnings" will do little to discourage so-called malingerers, but it would severely undermine the financial health of families forced onto long term disability due to severe injuries and disease. There is no need for this change, and certainly none that would justify the severe hardship and bureaucratic red tape created by this plan.

Metal Trades Council of New London County
Affiliated with the Metal Trades Department, AFL-CIO
18 PLEASANT STREET, GROTON, CONNECTICUT 06340
Telephone 445-1277

Thomas D. Kiddy
President

Raymond Sylvia
Vice-President

Joseph W. Messier
Recording Secretary

Joseph Quattromani
Secretary Treasurer

Partial Disability

The permanent disability and loss of wage earning capacity following maximum medical recovery after an injury contains the seeds for economic disaster for the worker. In our shipyard for instance, there is limited "light work". A shipfitter with only a 10 or 15 percent permanent impairment of the knee which prevents him from climbing ladders will be terminated. If he is older and has a limited education, he may be lucky to find work paying only half as much as he earned at the shipyard. He may even find that he is unemployable. It is impossible to measure lost wage earning capacity or disability by "physical impairment". Even a minor injury may render a worker seriously disabled if it prevents him from returning to his life-long trade.

The use of the "schedule" limiting compensation to the proportionate "loss of use" of the arm, leg, etc., may be simple, but also is usually unfair and frequently disasterous. A forty year old painter with a 30 percent loss of use of the leg which prevents him from standing for more than one hour a day would receive 5 months pay as compensation even if he lost half of his earning for the rest of his life. His losses are real, and he should be fairly compensated for them. The only fair and just way to do this is to permit the judge to decide the case on its merits in light of the specific facts involving the specific worker.

Retirement Limitations

The proposal to terminate benefits at retirement age sounds fair in the abstract but makes no sense in the real world of the workplace.

The proposals to reduce social security benefits and the pressures of inflation will force many if not most of our workers to continue working past the so-called retirement date. Their disabilities will not magically stop, however.

Furthermore, the loss of wages caused by injuries will have the direct effect of preventing our workers from saving for their retirement and of reducing their retirement benefits. For example, let's return to that 40 year old painter with the bad leg I just spoke of. If he was laid off because of lack of light duty from our company, he might very well lose all of his pension rights. If he was lucky enough to find another job which paid considerably less, his retirement based on his lost earnings might be reduced by 20 or 30 percent.

Metal Trades Council of New London County
Affiliated with the Metal Trades Department, AFL-CIO
18 PLEASANT STREET, GROTON, CONNECTICUT 06340
Telephone 445-1277

Thomas D. Kiddy
President

Raymond Sylvia
Vice-President

Joseph W. Messier
Recording Secretary

Joseph Quattromani
Secretary Treasurer

Cost of Living Adjustments

Unfortunately, not all injured workers promptly recover and return to work. Each year many thousands of workers suffer injuries leaving them totally disabled for long periods of time and perhaps permanently. It is totally unfair to freeze an injured worker at the wages he was earning when he was hurt. Nearly every compensation act now provides for some sort of cost of living adjustments to allow the family of the injured worker to at least keep up with inflation. Most statutes do this automatically if the disability lasts a year or more. One of the quirks of the Longshoremen's Act is that it only gives cost of living adjustments when the condition is "permanent". Rather than do away with this strange concept which has created so much unnecessary litigation and confusion, these amendments propose to punish the injured worker by slapping a cap of 3% per year on his cost of living adjustment. Never mind that inflation is running at 10-12% per year; disregard the fact that the employer's profits are growing at a similar rate.

This heartless and mindless proposal will force workers into destitution, break up families, and deny children education. It should be soundly rejected.

Notice

One of the greatest sources of injustice in the present Act is Section 12 with its so-called "notice" provisions. It requires the worker to give the employer written "notice" of his injury within 30 days from the date of injury. Failure to give such notice results in a total loss of compensation, even if the employer was in no way harmed by the lack of such a notice.

This provision is a holdover from the days when every "injury" consisted of a broken leg or hand, and was designed to let the employer promptly investigate the accident.

Unfortunately, this provision is now used by unscrupulous employers to avoid their responsibilities and to force the taxpayer to pick up the tab through welfare.

The modern day "injury" includes cancers, lung impairment, and nerve damage, developing 10 to 20 years after the worker is exposed to disease-causing agents. A worker who is told he is dying of lung cancer should not be punished because it takes him 31 days to notify his employer, particularly where the notice is meaningless since the exposure which caused the injury stopped 20 years earlier.

The proposal to strengthen this notice provision is unfair and unjust. If anything, Section 12 should be repealed since it no longer makes sense.

Presumptions

The Congress has long recognized that the right to compensation for injuries is not a game or sporting event. Congress has attempted to discourage needless litigation and to insure the prompt payment of compensation by establishing the humanitarian principle that the worker be given the benefit of the doubt in close cases.

It does this through the presumption created in Section 20 that the claim comes within the provisions of the Act. This presumption is even more important in this era of occupational diseases since we learn of new diseases each day.

This presumption is not conclusive and is thrown out once the employer presents "substantial evidence" that the injury is not work-related.

The proposal to reject this humanitarian principle would have far-reaching impact in increasing litigation, slowing down the payment of compensation, and signaling to employers that the Congress has lost its concern for the working man.

The presumption is fair and needed; it should be left alone.

Attorney Fees

When the worker has to employ the services of an attorney to obtain his benefits, he should not have his benefits reduced by attorney fees. Thus, the law now requires the employer to pay a reasonable attorney's fee in addition to the compensation. Any weakening of this policy should be avoided. This is particularly true of the vast bulk of claims which are resolved at the Deputy Commissioner's level following the employer's initial refusal to pay compensation.

First Notice of Injury

Under the present Act both the worker and employer have the duty to act promptly and fairly to each other. The worker is required to file a claim for compensation within 1 year of learning that his injury or disease is work-related. Failure to file such a claim bars his right to compensation. However, if the employer knows of the injury, say through chest x-rays, it is required to file a "first notice of injury" with the Department of Labor. Upon receiving this "first notice", the Deputy Commissioner informs the worker of his rights. If the employer fails to file this notice, the statute of limitations does not start to run until the notice is filed.

The purpose is simple. An unscrupulous employer who knows of an injury but hides this from his worker or lulls him into inaction should not be permitted to profit from his unclean actions.

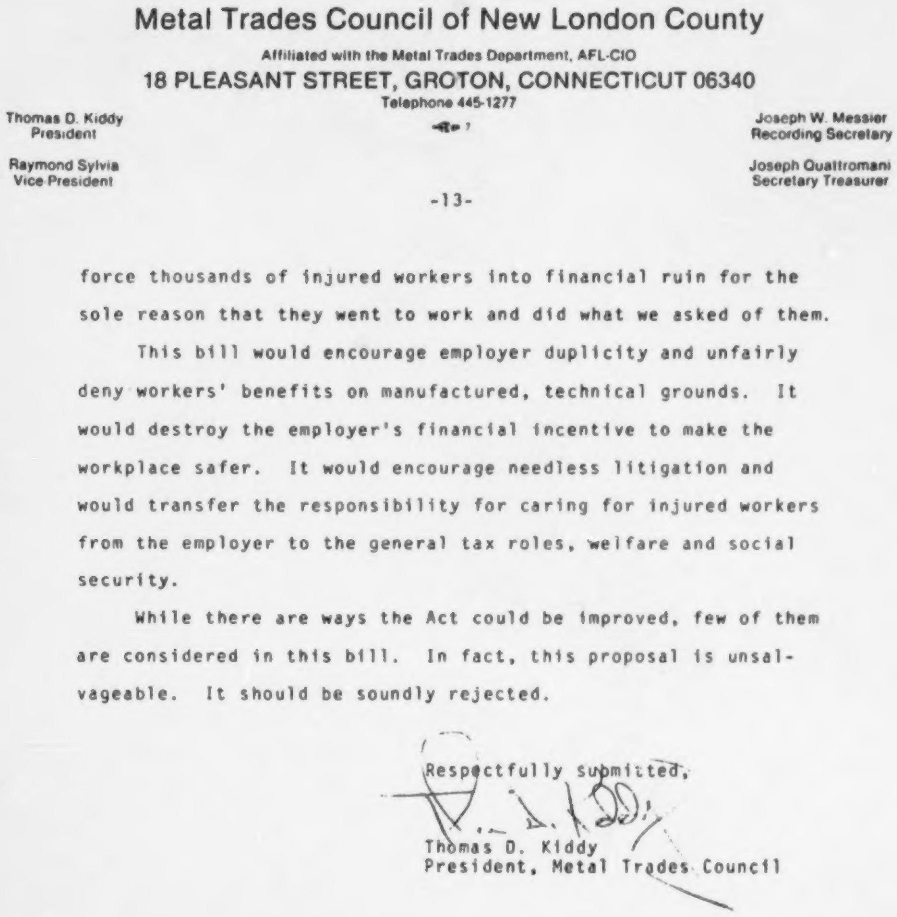
The proposals to weaken this arrangement would encourage employers to hide injuries from their workers, and would unjustly enrich those employers who immorally and unethically fail to inform their workers of their rights.

Conclusion

As I said earlier, these are but a few of the changes to the Act which would have horrible consequences for the working men and women of this country. I have just touched a few of the worst of the bad proposals contained in this bill.

For any compensation program to work, the Compensation Act must be fair to both sides. Both worker and employer must have faith in the law and feel that they are being treated fairly.

This bill makes no pretense at fairness. It seeks to openly introduce a violent bias against the worker and threatens to



Metal Trades Council of New London County
Affiliated with the Metal Trades Department, AFL-CIO
18 PLEASANT STREET, GROTON, CONNECTICUT 06340
Telephone 445-1277

Thomas D. Kiddy
President

Raymond Sylvia
Vice President

Joseph W. Messier
Recording Secretary

Joseph Quattromani
Secretary Treasurer

-13-

force thousands of injured workers into financial ruin for the sole reason that they went to work and did what we asked of them.

This bill would encourage employer duplicity and unfairly deny workers' benefits on manufactured, technical grounds. It would destroy the employer's financial incentive to make the workplace safer. It would encourage needless litigation and would transfer the responsibility for caring for injured workers from the employer to the general tax roles, welfare and social security.

While there are ways the Act could be improved, few of them are considered in this bill. In fact, this proposal is unsalvageable. It should be soundly rejected.

Respectfully submitted,

Thomas D. Kiddy
President, Metal Trades Council

Senator **Nickles**. This hearing is now adjourned.

[Whereupon, at 11:58 a.m., the subcommittee was adjourned.]

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1981

MONDAY, OCTOBER 5, 1981

U.S. Senate,
Subcommittee on Labor,
Committee on Labor and Human Resources,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:38 a.m., in room 4232, Dirksen Senate Office Building, Senator Don Nickles (chairman of the subcommittee) presiding.

Present: Senators Nickles and Williams.

Opening Statement of Senator Nickles

Senator Nickles. Good morning, gentlemen. I apologize for being a few minutes late. I had a phone call from the White House and was visiting about something else.

Today is the fourth day of hearings this year concerning the Longshoremen's and Harbor Workers' Act. The three previous days of hearings were held in June and concentrated on the severe injustices in the present law.

The current act was found to have two fundamental problems. First, it contains numerous provisions that encourage fraud and corruption. Senator Nunn testified before this committee detailing extensive illegal activities that have been uncovered as a result of the act. Second, because of the first problem, organized crime is attracted to the act because of its more-than-generous payouts. This was also evidenced during the June hearings.

A quick review of some other problems with the act and its 1972 amendments readily show that revision of the Act is now a necessity.

Under the act, benefit increases have far outstripped the growth of related economic indexes. In many cases, the benefits often exceed an employee's preinjury take-home pay.

The act also allows an unlimited annual, tax-free escalation of disability benefits.

It contains an unrelated death benefits clause which goes far beyond the intent of any workers' compensation laws.

It allows injured employees to choose their own doctors for verifying injury claims, which has become an unchecked allowance encouraging widespread abuse.

Also under the act, mandatory rehabilitation is not required. In addition, all filed claims are presumed to be valid.

As a result of these provisions and many others, it has been noted that in the State of New York, for every $100 in salaries, employers are compelled to pay an additional $87.24 in compensation costs under the Longshoremen's Act.

Today, the Reagan administration will testify in support of legislation introduced to amend the act in Senate bill 1182.

I want to welcome Bob Collyer, who is the Deputy Under Secretary of Labor for the Employment Standards Administration. I am grateful for their support and recognition of the problems in the current law. I also would encourage your suggestions for making this legislation a measure which will put an end to increasing violations of the law and bring sanity back to the Longshoremen's and Harbor Workers' Act.

Mr. Collyer, welcome. Would you be so kind as to introduce the people who are with you this morning.

STATEMENT OF HON. ROBERT B. COLLYER, DEPUTY UNDER SECRETARY, EMPLOYMENT STANDARDS ADMINISTRATION, DEPARTMENT OF LABOR, ACCOMPANIED BY RALPH M. HARTMAN, DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; NEIL MONTONE, ASSOCIATE DIRECTOR OF OWCP FOR LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION, AND JAMES DeMARCE, EXECUTIVE ASSISTANT TO THE DIRECTOR

Mr. COLLYER. Yes, Mr. Chairman. And as a matter of fact, we are much later than you are this morning, so you are forgiven.

I will read a short summary of our total testimony and request that the entire package be put into the record.

Senator NICKLES. Your entire testimony will be put into the record, and I appreciate your synopsis of it and highlights, if you would, please.

Mr. COLLYER. Mr. Chairman and members of the subcommittee, thank you for this opportunity to appear before your subcommittee today to discuss issues relating to the Longshoremen's and Harbor Workers' Compensation Act.

Appearing with me today are Mr. Ralph M. Hartman, to my immediate left, Director of the Office of Workers' Compensation Programs; Mr. Neil Montone, on my right, Associate Director for Longshore and Harbor Workers' Compensation, and James DeMarce, Executive Assistant to the Director, to my far left.

The Longshore Act, which was last amended in 1972, has been the subject of increasing criticism as a workers' compensation program. Its relatively high benefits structure and expansive coverage have led employers and insurance companies alike to declare that longshore costs have risen to unmanageable levels.

Criticism of this program is not unwarranted, as there are problems with the act as it is now written. Most of them stem from the 1972 amendments which made sweeping changes in the law. We therefore recognize the need for amending the act and would like to work with you and your subcommittee in refining S. 1182.

Our views on this matter were developed in the course of lengthy consultations with industry, labor, and insurance representatives. Throughout this process, we attempted to keep in mind that this program is primarily one of concern to the parties themselves and is segregable from Federal programs that may have similar features such as cost-of-living adjustments but which are funded by the taxpayers.

Our views on many of these issues, therefore, should not be read as expressing any view on any program but this one. That, by the way, includes the black lung program. Furthermore, while our interests as the program administrator need to be carefully considered, particularly in light of the budgetary pressures now facing all of us, it is not our intent to press our views on the parties or on this subcommittee. We do not offer a bill at this time. Rather, we are here at your request, and we would like to work with you in your efforts to develop the best possible legislation that can be enacted to once again make this program one which can meet its stated goals.

I believe that it would be helpful at the outset to briefly review the history of workers' compensation and the Longshore Act. Workers' compensation evolved during the first quarter of this century as a State-enacted program to protect workers who were injured on their jobs. These were the first of the worker protection laws which developed before World War II.

The Longshore Act was enacted in 1927 to fill a gap in State coverage which had resulted from a decision by the Supreme Court that the Federal Government had sole jurisdiction over certain maritime activities. Between 1927 and 1972, the act was amended to extend its jurisdiction through auxiliary acts, such as the Defense Base Act and the Nonappropriated Fund Instrumentalities Act. Other amendments during these years added safety inspection requirements and made minor changes in benefits.

The most far-reaching amendments came in October 1972, when the act was extensively rewritten. In general, the amendments attempted to incorporate the essential recommendations of the National Commission on State Workmen's Compensation Laws, which had issued its report a few months before, in July 1972.

The real impetus for amending the act, however, was the proliferation of damage suits against vessel owners by employees of the stevedores, claiming a warranty of seaworthiness. Vessel owners then included a hold-harmless and indemnification agreement in the stevedores' contract which circumvented the exclusive remedy provisions of the Longshoremen's and Harbor Workers' Compensation Act and passed liability from the owner to the employer. These suits were clogging the courts. The 1972 amendments limited suits against vessel owners to actual negligence and indemnification agreements were prohibited.

I would like to note in this regard that the 1972 changes on indemnification have had unanticipated results upon the offshore oil drilling activities covered by the act and its extension to the Outer Continental Shelf. I recommend that the subcommittee solicit and give serious consideration to the views of the International Association of Drilling Contractors and the offshore services and supply industries about further changes which are appropriate to modify the current provisions of section 5(b) to meet the unique circumstances of those activities.

Additionally, the 1972 amendments expanded the act's coverage shoreside to include maritime-related employment on land. Other changes made by the 1972 amendments included increasing maximum weekly benefits from $70 to 200 percent of thc national average weekly wage. On October 1, 1981, this benefit increased to $496.70. It included an expanded appeals system which provided administrative hearings by administrative law judges in place of broad authority of the Deputy Commissioners to resolve disputes; employee freedom to choose treating physicians; broadened employer relief from full payment of compensation arising from an injury increasing the disability of a previously handicapped employee; payments to the survivors of a permanently disabled employee even when death is not connected to employment; and failure to include the customary cap on weekly benefits to widows.

During hearings which the subcommittee held this past June, you heard suggestions from both industry and insurance witnesses and from representatives of labor organizations for improving the Longshore Act proqram.

I would like to very briefly summarize their major suggestions. Industry and insurance associations proposed the following: Clarify the act's coverage as a way to mitigate administrative and judicial interpretations which have become increasingly broad; make liability under the act more insurable by tempering some benefit levels and capping the amounts of annual benefit escalation; restrict the present act's free choice of physician provision, and permit agreed settlements of death claims.

Major suggestions from labor organizations were: Enact national standards legislation instead of amending the Longshoremen's Act; improve workplace health and safety through increased Federal inspection of port facilities; strengthen the resources of those who administer the act, and regulate the private insurance industry and investigate its ratemaking practices.

We have also carefully reviewed the economic impact of the 1972 amendments. The number of reported injuries, the amount of compensation, and the level of insurance premiums for workers covered by the Longshoremen's Act have increased substantially since the time the amendments were passed.

Excluding payments in the District of Columbia and a newly increased special injury fund, compensation paid under the act increased sevenfold—from $33 million in 1972 to $224.6 million in 1980—and the shipbuilding industry's workers' compensation costs increased ninefold. These increases are due primarily to four factors: The expansion in Longshoremen's Act jurisdiction contained in the 1972 amendments; real benefit increases resulting largely from the 1972 maximum weekly benefit increase; an increase in the number of working days lost from each injury; and inflation. In New York City, the most extreme example, insurance for longshoremen costs employers at least—I think it is now down to $84 for every $100 in wages.

Senator **Nickles**. Is that $84?

Mr. **Collyer**. I think it went down about a month ago, from $87.25.

Although Longshoremen'smen's Act insurance costs are lower in other ports, premium levels are higher than if State workers' compensation laws applied.

While the direct costs of the program are paid through private insurance premiums, or direct payments to recipients in the case of self-insured employers, the 1972 amendments to the act have also raised Federal spending by increasing labor costs for firms with Federal contracts. The Maritime Administration estimates that the Federal Government paid $77 million in 1980 compared with $12 million in 1972 on workers' compensation benefits for employees working on Federal shipbuilding and repair work.

I would now like to describe for you our position on nine key issues that have been presented in the course of these hearings. These issues are not exclusive in their importance. They are, however, issues which have attracted particular interest in these hearings, and to which we have therefore given special attention.

First, on coverage, we propose that coverage be returned to the water's edge, the original jurisdictional boundary, and further that effect be given to a pre-1972 provision that a work-related injury over the water that is deemed to be covered by a State workers' compensation program shall not be covered under the Federal program.

On benefit maximums, we propose that benefit increases for permanent total disability and death beneficiaries under this program be limited to 6 percent a year. The absence of a cap has been a factor resulting in the very limited number of insurance carriers in this market, and creates particular jeopardy for self-insurers. This cap is close to the 7-percent annual average increase since 1972, and provides certainty within the boundaries of reasonable future inflationary expectations.

On spendable earnings, workers' compensation has traditionally based nontaxable benefits on two-thirds of predisability gross income. Because of the tax structure's effects, the higher the income level, the more likely it is that benefits would approach or even exceed predisability aftertax income. To deal with this situation, the administration has already proposed going to a spendable earnings benefit concept for the Federal Employees' Compensation Act, and we agree with the approach incorporated in S. 1182.

On choice of physician, currently, employees have free choice of treating physician. Employers and insurers have been concerned because this has reportedly led to a considerable amount of fraud and abuse, especially with some doctors. We recommend that the law continue to allow the employee to initially select the treating physician. However, should an employer object to the employee's choice, the Labor Department Deputy Commissioner would be given the authority to make a final decision as to the appropriateness of the physician to be used.

On offsets, offsets between workers' compensation and social security programs are needed to insure the retention of appropriate work incentives and to hold down total costs. We believe that workers' compensation should be the primary payer during the normal working life expectancy of employees to strengthen the safety incentive to employers. In terms of social security retirement, Longshoremen's benefits could be reduced by up to 50 percent of the social security benefit at retirement age—the percent contributed by the employer to that particular program. This is, however, an area we are continuing to study.

On wage base in partial disability cases, we believe that benefits paid to those with partial disabilities should diminish to zero at the time their current income exceeds predisability income. We also recommend, however, that the predisability wage base used for purposes of this calculation needs to be indexed in some fashion.

The second injury fund, paid for mainly by assessments against all insurers and self-insured employers under the act, pays benefits for those workers whose injury results in an increase in a preexisting disability. Reliance on this fund is being used more and more by employers and insurers, and the costs to the fund are growing rapidly. We therefore recommend three changes in the law to curtail the abuse of this fund: (a) tighten the definitions of the terms preexisting disability and substantially greater injury; (b) give the Labor Department more authority to limit the fund's usage; and (c) charge the fund for the costs of its administration and its legal defense.

On case review, in order to improve our ability to process cases more swiftly and efficiently, some changes must be made in the present system. We therefore recommend that in the case of Longshoremen's procedures, authority be returned to the Deputy Commissioners to make binding decisions based on findings of fact.

On grandfathering, we recommend that any provisions enacted be made prospective in nature rather than to attempt to go back and try to change benefit levels or eligibilities already established under current law. This is based on legal and administrative considerations. It also reflects the fact that existing benefits levels have been taken into account in premium payments already made through the normal insurance ratemaking process. The 6-percent cap on indexation, however, should apply to future benefits on existing claims.

Mr. Chairman, this concludes my statement. I would like to reiterate my pledge that the administration will work closely with the subcommittee in developing legislation to make appropriate changes in the Longshoremen's Act. Your bill, Mr. Chairman, and our recommendations are both designed to improve the act and restore some balance between the two fundamental principles of any workers' compensation program—financial security for injured workers and work incentives for their return to work.

We will be happy to answer any questions that you or any of the members of the subcommittee may have.

[The prepared statement of Mr. Collyer follows:]

STATEMENT OF ROBERT B. COLLYER
DEPUTY UNDER SECRETARY OF LABOR
FOR EMPLOYMENT STANDARDS
BEFORE THE
SUBCOMMITTEE ON LABOR
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

October 5, 1981

Mr. Chairman and Members of the Subcommittee:

Thank you for this opportunity to appear before your Subcommittee today to discuss issues relating to the Longshoremen's and Harbor Workers' Compensation Act. Appearing with me today are Mr. Ralph M. Hartman, Director of the Office of Workers' Compensation Programs (OWCP), and Mr. Neil Montone, Associate Director of OWCP for Longshore and Harbor Workers' Compensation.

The Longshore Act, which was last amended in 1972, has been the subject of increasing criticism as a workers' compensation program. Its relatively high benefit structure and expansive coverage have led employers and insurance companies alike to declare that Longshore costs have risen to unmanageable levels. Criticism of the program is not unwarranted, as there are problems with the Act as it is now written. Most of them stem from the 1972 amendments which made sweeping changes in the law. We therefore recognize the need for amending the Act, and would like to work with your Subcommittee in developing legislation along the lines of S. 1182.

Our views on this matter were developed in the course of lengthy consultations with industry, labor and insurance representatives. Throughout this process, we attempted to keep in mind that this program is primarily one of concern to the parties themselves, and is segregable from Federal programs that may have similar features (such as cost-of-living adjustments) but which are funded by the taxpayers. Our views on many of these issues, therefore, should not be read as expressing any view on any program but this one. That, by the way, includes the Black Lung program. Furthermore, while our interests as the program administrator need to be carefully considered, particularly in light of the budgetary pressures now facing all of us, it is not our intent to press our views on the parties or on this Subcommittee. Rather, we are here at your request, and we would like to work with you in your efforts to develop the best possible legislation that can be enacted to once again make this program one which can meet its stated goals.

I believe that it would be helpful at the outset to briefly review the history of workers' compensation and the Longshore Act. Workers' compensation evolved during the first quarter of this century as a State-enacted program to protect workers who were injured on their jobs. These were the first of the worker protection laws which developed before World War II. The Longshore Act was enacted in 1927 to fill a gap in state coverage which had resulted from a decision by the Supreme Court (Southern Pacific Co. v. Jensen) that the Federal government had sole jurisdiction over certain maritime activities. Between 1927 and 1972 the Act was amended to extend its jurisdiction through auxiliary Acts, such as the Defense Base Act and the Nonappropriated Fund Instrumentalities Act. Other amendments during these years added safety inspection requirements and made minor changes in benefits.

The most far-reaching amendments came in October 1972, when the Act was extensively rewritten. In general, the amendments attempted to incorporate the essential recommendations of the National Commission on State Workmen's Compensation Laws, which had issued its report a few months before, in July 1972.

The real impetus for amending the Act, however, was the proliferation of damage suits against vessel owners by employees. These suits were brought by the employees to supplement the limited benefits they received from their stevedore employers under the Act's low benefits structure prior to 1972. Vessel owners were enabled under a Supreme Court decision to implead the employer to share liability with the shipowner. These suits were clogging the courts. In an effort to eliminate such suits, maximum weekly benefits were increased from a flat $70 to 200 percent of the national average weekly wage. On October 1 of this year, the maximum weekly benefit became $496.70. Suits against vessel owners were limited to actual negligence, and indemnification agreements were prohibited.

I would like to note in this regard that the 1972 changes on indemnification have had unanticipated results upon the offshore oil drilling activities covered by the Act and its extension to the Outer Continental Shelf. I recommend that the Subcommittee solicit and give serious consideration to the views of the International Association of Drilling Contractors and the offshore service and supply industries about further changes which are appropriate to modify the current provisions of section 5(b) to meet the unique circumstances of those activities.

Additionally, the 1972 amendments expanded the Act's coverage shoreside to include maritime-related employment on land. Other changes made by the 1972 amendments included:

- An expanded appeals system which provided administrative hearings by Administrative Law Judges in place of broad authority of the Deputy Commissioners to resolve disputes.
- Employee freedom to choose their treating physicians.
- Broadened employer relief from full payment of compensation arising from an injury increasing the disability of a previously handicapped employee.
- Payments to the survivors of a permanently disabled employee even when death is not connected to employment.

During hearings which the Subcommittee held this past June, you heard suggestions from both industry and insurance witnesses and from representatives of labor organizations for improving the Longshore Act program. I would like to very briefly summarize their major suggestions. Industry and insurance associations proposed the following:

- o Clarify the Act's coverage as a way to mitigate administrative and judicial interpretations which have become increasingly broad;
- o Make liability under the Act more insurable by lowering benefit levels and capping the amounts of annual benefit escalations;
- o Restrict the present Act's free choice of physician provision; and
- o Permit agreed settlements of death claims.

Major suggestions from labor organizations were:

- o Enact national standards legislation instead of amending the Longshore Act;
- o Improve workplace health and safety through increased Federal inspection of port facilities;
- o Strengthen the resources of those who administer the Act; and
- o Regulate the private insurance industry and investigate its ratemaking practices.

We have also carefully reviewed the economic impact of the 1972 Amendments. The number of reported injuries, the amount of compensation and the level of insurance premiums for workers covered by the Longshore

Act have increased sustantially since the time the Amendments were passed. Excluding payments in the District of Columbia and a newly increased special injury fund, compensation paid under the Act increased seven-fold--from $33 million in 1972 to $220 million in 1980--and the shipbuilding industry's workers' compensation costs increased nine-fold. These increases are due primarily to four factors: (1) the expansion in Longshore Act jurisdiction contained in the 1972 amendments; (2) real benefit increases resulting largely from the 1972 maximum weekly benefit increase; (3) an increase in the number of working days lost from each injury; and (4) inflation. In New York City, the most extreme example, insurance for longshoremen costs employers at least $87 for every $100 in wages. Although Longshoreman's Act insurance costs are lower in other ports, premium levels are higher than if state workers' compensation laws applied.

While the direct costs of the program are paid through private insurance premiums (or direct payments to recipients in the case of self-insured employers), the 1972 amendments to the Act have also raised Federal spending by increasing labor costs for firms with Federal contracts. The Maritime Administration estimates that the Federal government paid $77 million in 1980 compared with $12 million in 1972 on workers' compensation benefits for employees working on Federal shipbuilding and repair work.

I would now like to describe for you our position on nine key issues that have been presented in the course of these hearings. These issues are not exclusive in their importance. They are, however, issues which have attracted particular interest in these hearings, and to which we have therefore given special attention.

Coverage

We propose that coverage be returned to the water's edge, as it was prior to 1972; and further that effect be given to a pre-1972 provision that a work-related injury over the water that is covered by a State workers' compensation program shall not be covered under the Federal program. The latter was in the pre-1972 law, but was not effectuated following a series of court decisions concerning the intent of the Congress in this regard.

Benefit Maximums

We propose that benefit increases for permanent total disability and death beneficiaries under this program be limited to six percent a year. The absence of a cap has been a factor resulting in the very limited number of insurance carriers in this market, and creates particular jeopardy for self-insurers. This cap is close to the seven percent annual increase average since 1972, and provides certainty within the boundaries of reasonable future inflationary expectations.

Spendable Earnings

Workers' compensation has traditionally based benefits on two-thirds of predisability income (nontaxable). Because of the tax structure's effects, the higher the income level, the more likely it is that benefits would approach or even exceed predisability after-tax income. To deal with this situation, the Administration has already proposed going to a spendable earnings benefit concept for the Federal Employees' Compensation Act (FECA), and we propose that a similar approach be followed here. S.1182 incorporates such an approach.

Choice of Physician

Currently, employees have free choice of treating physician. Employers and insurers have been concerned because this has reportedly led to a considerable amount of fraud and abuse, especially with some doctors. We recommend that the law continue to allow the employee to initially select the treating physician. However, should an employer object to the employee's choice, the Labor Department Deputy Commissioner would be given the authority to make a final decision as to the appropriateness of the physician used.

Offsets

Offsets between workers' compensation and social security programs are needed to ensure the retention of appropriate work incentives and to hold down total costs. We believe that workers' compensation should be the primary payer during the normal working life expectancy of employees to strengthen the safety incentive to employers. In terms of social security retirement, Longshore benefits could be reduced by up to 50 percent of the social security benefit at retirement age -- the percent contributed by the employer to that program. This is, however, an area we are continuing to study.

Wage Base in Partial Disability Cases

We believe that benefits paid to those with partial disabilities should be cut off at the time that their current income exceeds predisability income. We also recommend, however, that the predisability wage base used for purposes of this calculation needs to be indexed in some fashion.

Second Injury Fund

The second injury fund, paid for mainly by assessments against all insurers and self-insured employers under the Act, pays benefits for those workers whose injury results in an increase in a pre-existing disability. Reliance on this fund is being used more and more by employers and insurers, and the costs to the fund are growing rapidly. We therefore recommend three changes in the law to curtail the use of this fund: (a) tighten the definitions of what is a pre-existing disability and what is substantially greater injury; (b) give the Labor Department more authority to limit the fund's usage; and (c) charge the fund for the costs of its administration and its legal defense.

Case Review

In order to improve our ability to process cases more swiftly and efficiently, some changes must be made in the present system. We therefore recommend that in the case of Longshore procedures, authority be returned to the our Deputy Commissioners to make binding decisions based on findings of fact. The role of the Administrative Law Judges would be eliminated in these cases. They will, of course, remain involved in Black Lung claims.

Grandfathering

We recommend that any provisions enacted be made prospective in nature rather than to attempt to go back and try to change benefit levels or eligibilities already established under current law. This is based on legal and administrative considerations. It also reflects the fact that existing benefits levels have been taken into account in premium payments already made through the normal insurance rate-making process.

I would now like to review these and other issues in more detail. While highly technical in places, this discussion will, I hope, illuminate a variety of matters of interest to us as program administrators.

Coverage

On coverage, I would simply like to reiterate that we propose that coverage be returned to the water's edge, as it was prior to 1972; and further that effect be given to a pre-1972 provision that a work-related injury over the water that is covered by a State workers' compensation program shall not be covered under the Federal program. The latter was in the pre-1972 law, but was not effectuated following a series of court decisions concerning the intent of the Congress in this regard.

Consistent with this, I would suggest that the title of the Act be changed to the "United States Navigable Waters Workers' Compensation Act of 1981."

Benefit Maximums

S. 1182 would limit the annual escalation of benefits provided. Currently, there is no limitation on annual adjustments which coincides with percentage increases in the national average weekly wage. We favor placing a cap on annual adjustments, and would recommend that it be set at six percent. The absence of a cap may jeopardize the insurability of employers under the Act. However, it is the unpredictability which jeopardizes insurability more than the annual amount. A six percent cap is close to the seven percent average annual increase since 1972, and is a rate that is financially feasible.

S. 1182, in a revised Section 9(b), places the same maximum weekly limit on death and disability benefits alike--200 percent of the national average weekly wage or 80 percent of the deceased employee's spendable earnings, whichever is less. The current Act only limits disability benefits. This was an apparent oversight in the drafting of the 1972 amendments and we agree that the maximum should uniformly apply to death as well as disability benefits.

Section 6(c) of the current low prescribes separate maximum and minimum rates of compensation for Nonappropriated Fund Instrumentality employees. S. 1182 proposes no change in Section 6(c). We suggest that benefits under this Act be made uniform with the basic Longshore Act.

Spendable Earnings

S. 1182 adopts the spendable earnings concept recommended by the National Commission on State Workemen's Compensation Laws in its 1972 report. The bill provides that the compensation rate in Sections 8(a) and 8(b) of the Act be changed from 66-2/3 percent of gross earnings to 80 percent of spendable earnings. Spendable earnings would be defined as the net amount after appropriate amounts are deducted for State and Federal taxes. We, too, favor the spendable earnings approach to compensation. However, we recommend the deduction of Federal, State, and local taxes, as well as Social Security taxes in advocacy at spendable earnings. The Administration has also proposed that benefits under the Federal Employees' Compensation Act be computed based on spendable earnings. Stating income as replacement of a portion of pre-disability spendable earnings rather than of gross earnings is consistent with the bill's intent of assuring that the benefits paid as injury compensation should not be more than pre-injury disposable wages. The spendable income approach could remove the disincentive that many injured workers have to return to work as soon as possible.

S. 1182 adds a new Subsection 6(e) which sets forth the method for computing spendable earnings--that is, reducing the amount of gross wages by amounts withheld for certain taxes. We suggest that Subsection 6(e) be modified to state that for purposes of State and local tax deductions, the amount to be withheld would be the appropriate tax of the State and locality which taxes the employee at the time of injury, and would not change should the employee move to another State or locality. Further, to be specific about Federal, State and local tax exemptions, we suggest that the new Subsection 6(e) state that, at least initially, the number of exemptions claimed by the employee on Federal Form W-4 (Employee's Withholding

Allowance Certificate), and the comparable State and local withholding form, at the time of injury would be the number that would apply for computing spendable earnings.

As an alternative to the survivors' benefits in the current Act, which are not altered by S. 1182 except for the weekly maximum limitation, we propose that death benefits be tied to the decedent's pre-injury spendable earnings. The death benefits contained in the present law are tied to average weekly earnings, as are disability earnings. For the dependent spouse, we propose compensation be paid at the rate of 60 percent of the decedent's pre-injury spendable earnings and surviving children at 20 percent, subject to a maximum of 80 percent of spendable earnings. We suggest that other dependent relatives should receive in compensation 60 percent of the decedent's pre-injury spendable earnings, subject again to a maximum of 80 percent where there is more than one such other relative. It is also important that the amended language specify, in the case of other relatives, that eligibility for compensation requires proof of total dependency on the income of the deceased.

Choice of Physician and Medical Treatment

The amended Subsections 7(b) and 7(c) proposed by S. 1182 would limit the rights injured employees now have to freely choose their own treating physicians. S. 1182 would restrict the choice by requiring that injured workers seek medical treatment from a list of physicians approved by the Deputy Commissioner from a list submitted to him by covered employers.

We suggest that the S. 1182 procedure be further modified in the following manner. Give the employee the initial free choice of a treating physician if acceptable to the employer. However, if the employer objects, the Deputy Commissioner, as an impartial party, shall make a determination as to the treating physician from those licensed to practice in the particular State. In situations of severe injury where the employee is unable to make an initial selection, the employer should, as presently, be allowed to make the initial selection until such time as the employee is able to make the choice.

Regarding the provision in Section 7(d) of both the current law and in S. 1182 allowing the suspension of compensation if an employee unreasonably refuses medical treatment, we recommend that a qualification be allowed in cases of recommended surgery. If surgical treatment is recommended to the employee, we suggest that the employee be expressly given the right to obtain a second medical opinion. We agree with the other provision which S. 1182 proposes to add to section 7(d) which would free employers from liability for penalties, attorneys' fees, or for compensation payments that would otherwise have been payable for a period during which compensation proceedings are suspended because of an employee's refusal to be medically treated without good cause.

We agree with the provision in S. 1182 to repeal Subsection 7(i) of the Act. This subsection bars any physician from making an independent medical examination of a claimant if the physician had provided medical services to an insurance carrier or self-insurer under the Act during the two previous years. This provision has proved to be administratively unworkable and presumes a bias on the part of any physician who receives a fee from an insurer, even if such a fee is inconsequential.

Offsets

Section 8(a) as it would be amended by S. 1182 provides that Longshore benefits shall be reduced by any amounts received from other types of programs-

-Social Security, unemployment compensation, State workers' compensation, and private retirement funds. The present Act does not expressly provide for benefit offsets. We believe that workers' compensation should be retained as the primary benefit, during the normal expected working life of employees, consistent with the recommendation of the National Commission on State Workmen's Compensation Laws. Deductions should be taken from other payments the employee may be receiving from other programs of income protection to avoid duplication, overcompensation, and replacement of more than pre-disability income. Social Security disability insurance payments are now subject to workers' compensation offsets as are unemployment and workers' compensation payments in some States.

Upon retirement, or the age at which full Social Security benefits are available, whichever is the later date, all Longshore disability benefits could be reduced by up to 50 percent of social security retirement benefits -- the percentage of the latter paid for by employers. Reducing Longshore benefits at retirement, rather than the reverse--as we are advocating for application during the normal working life of the employee--would avoid any conflict with State laws and legal precedents which make it questionable whether amounts which are theoretically paid for by employees could be reduced. We note that private pension payments may include provisions for the reduction of those payments by the amount of workers' compensation benefits according to a recent Supreme Court ruling, Alessi v. Raybestos-Manhattan, Inc.

Under Section 8(b), as it would be amended by S. 1182, compensation for temporary total disability would cease once the injured employee attained the age of retirement prevailing in the industry and region of employment. We suggest that a uniform retirement age be stated in the amendment as the age at which full Social Security benefits are available, thus avoiding the imprecision of local prevailing ages.

Partial Disability

S. 1182 does not change the provision in Subsection 8(c)(20) of the current Act which pays up to $3,500 for serious disfigurements of the face, head or neck. To be more equitable, we believe that the maximum disfigurement allowance should be changed to 20 weeks of compensation. Additionally, we believe that the Act should be further amended to prohibit the payment of both cosmetic damages under Subsection 8(c)(20) and physical impairment compensation for the same injury.

Subsection 8(c)(13) as changed by S. 1182 rather extensively details hearing loss standards. The bill would limit evaluation of hearing loss to measurement frequencies of 500, 1,000 and 2,000 cycles per second. These frequency standards were revised by the American Medical Association (AMA) in 1979 and are subject to further change. We recommend that the precise and detailed hearing loss standards prescribed by S. 1182 be omitted and replaced by a provision stating that they will be the standards approved by the AMA as they may change from time to time. This would give us, as administrators of the Act, flexibility and provide for the use of any medical technological developments.

A new schedule award is added to Section 8(c) of the Act by S. 1182 for spinal impairments--newly designated Subsection 8(c)(21) by S. 1182. We favor this method of compensating an injury which to date has been administratively troublesome. The new provision in S. 1182 is similar to one North Carolina has had in its law for many years and I understand it has been effective. We suggest, however, that the eligibility language be drafted to be as tight as possible to ensure only valid claims are compensated.

Section 8(c)(21) of the current law deals with permanent partial disability cases not specified in the schedule-- Sections 8(c)(1) through 8(c)(20). Compensation for such injuries is based on the employee's loss of wage-earning capacity. S. 1182 would limit payments to the employee's normal working life as described earlier. Further, to more accurately reflect pre-injury income, we suggest that determinations under Section 8(c)(21) be based on the injured employee's demonstrated actual wages and wage loss rather than the present and sometimes elusive system of estimating a person's capacity to earn.

Provision is made in S. 1182 for those injured employees whose actual earnings after the injury exceed pre-injury wages and for those employees whose wages decrease (Proposed sections 8(c)(i) and 8(c)(ii)). We agree with the approach of S. 1182--reducing or suspending compensation for those who earn more and allowing petitions for review of compensation for those whose actual earnings decline. However, we believe a formula is needed for indexing the real value of a worker's pre-injury earnings.

We agree with a provision in S. 1182--proposed new section 8(c)(22)(B)--which would prohibit eligibility for both a schedule award--such as the loss of an arm--and subsequent compensation for the same injury based on a loss of wage-earning capacity. This is, in fact, under a recent Supreme Court decision, the present rule. Compensation from the schedule award provisions should remain the exclusive remedy for the specified injury.

For Section 8(e) of the Act, we suggest that the five-year limitation on payments to temporary partial disability recipients whose wages decrease as a result of injury be eliminated. S. 1182 would not change the time limitation, but we believe that it is unfair to arbitrarily drop such workers when their diminished capacity to earn continues beyond five years.

S. 1182 would place a maximum of 312 weeks on scheduled permanent partial disability payments. We favor this provision in S. 1182.

Second Injury Fund

Section 8(f) provides relief for employers who hire workers with existing impairments by limiting their liability for compensation payments in the event that the handicapped worker suffers an injury which is followed by greater disability than the second injury alone would have caused. The provision, which is designed to facilitate the employment of handicapped workers, is well-intentioned but has been misused. Increasingly, employers and insurance carriers view the relief provisions of Section 8(f) as a means of reducing their compensation costs by showing that an employee injured on a current job had a pre-existing disability when hired. This practice demonstrates a need for better definitions of the terms "existing permanent partial disability" and "substantially greater" as used in Section 8(f). Recent decisions by circuit courts have held that if the employer could have known about the prior disability by making a thorough investigation, the subsequent injury is covered by Section 8(f). We believe Section 8(f) should be limited to conditions which were actually known to the employer before the injury.

We further suggest that the apportionment of second injury payments between the employer and the Special Fund be changed. Under the present Act, the liability of the employer of an employee with a prior disability is limited to the payment of 104 weeks of compensation and all required medical expenses. All periodic compensation after 104 weeks, including indexed annual adjustments, is paid from the Special Fund. We recommend that a formula be devised to apportion payments after 104 weeks between the employer and the Special Fund. The Subcommittee may also wish to consider extending the period of employer liability beyond the 104 weeks provided by the current law; if so, we suggest a liability period of five years.

We suggest that Section 44(j) of the Act be amended to remove payments from the Special Fund for rehabilitation maintenance allowances and rehabilitation costs. We propose that the employer pay these costs. We also recommend that the costs of defending the Fund against requests for second-injury relief be borne by the Fund.

Case Review

Under S. 1182, the Benefits Review Board (BRB) would be appointed by the President and would become independent of the Department of Labor. The Administrative Law Judges who hear Longshore cases would also be assigned to the BRB.

The administrative system that applied before 1972 involved appeal of cases directly from the Deputy

Commissioners to the district courts. The district courts were becoming clogged by Longshore cases involving the "unseaworthiness" indemnity obligations of employers. However, this liability was abolished by the 1972 amendments.

During the five years preceding the 1972 amendments (1967-1971), an average of 34 Longshore compensation cases per year were appealed to the district courts. Last fiscal year, 3,500 cases were received for hearings review by the Administrative Law Judges (ALJ). Between four and five hundred of the ALJ decisions are now appealed to the BRB each year. Thus, cases continuing through the litigation process have proven to be expensive for the Department of Labor and the industries, as well as slow for the involved employees.

We propose that no change be made in the BRB. However, we propose that the Deputy Commissioners, rather than the ALJ's, conduct hearings under the Longshore Act. The Department favors the retention of Section 21, which provides for representation of the Secretary by the Solicitor of Labor in most cases under the Act.

S. 1182 would modify the procedures somewhat for the approval of settlements by the Deputy Commissioners by providing for an appeal in connection therewith to the Administrative Law Judges (ALJ) and the Benefits Review Board (proposed section 8(i)(2)). The present law does not contain an appeals procedure for these cases. We favor S. 1182's altered language with some modifications.

We believe that settlements of death cases should be permitted, the same as for permanent disability cases. Death case settlements are not now permitted nor would S. 1182 allow them. Also, we suggest that the provision in the current law which allows settlement of medical claims be retained. We believe that the 30-day time limit in S. 1182 for Deputy Commissioners to approve settlements should be extended to 60 days. Also, we have suggested that the ALJ hearing step in the appeals process by eliminated; this would take settlement appeals directly to the Board.

We accept the procedural modifications of Sections 19(a), 19(c) and 19(d) proposed by S. 1182, but, as noted previously, we propose that the Administrative Law Judge review level be eliminated. For Sections 19(e) and 19(h), we advocate retention of the current law.

S. 1182 provides for the payment of witness fees in hearings before Administrative Law Judges as they are now paid to witnesses testifying before the Federal courts. If our proposal to eliminate the Administrative Law Judge review level is adopted, the change proposed by S. 1182 would not be necessary.

Grandfathering

As previously indicated, we recommend that any provisions enacted be made prospective in nature rather than to make any attempt to go back and try to change benefit levels or eligibilities already established under current law.

Other Matters Deserving Attention

In addition to the general topics previously discussed, there are additional matters deserving of attention in a review of the present law. I would now like to describe these, in section by section fashion, for your consideration.

Section 3 (Definitions)

S. 1182 would remove the word "solely" from Section 3(b), thus denying benefits in any injury case where intoxication can be shown to be a contributing factor. We do not believe this is in harmony with the "no fault" principle of workers' compensation and would therefore recommend that the current law be retained.

S. 1182 would add a new Section 3(c) to the Act to penalize employees who knowingly misrepresent their medical conditions on employment applications. We believe such a provision can help eliminate abuses and improve administration.

Section 8 (Compensation for Disability)

We favor the new provision in Section 8(g), as amended by S. 1182, which would require the continued payment of temporary total or partial compensation to employees while undergoing vocational rehabilitation. We suggest that, our focus should be shifted from rehabilitation as such to reemployment, and that employers assume more responsibility for this effort than at present. As a penalty for an employee's refusal to participate in an approved plan offered and paid for by the employer, we endorse the provision in S. 1182 that the employee's compensation be suspended. We also agree with S. 1182's elimination of the $25-a-week maintenance allowance which is paid to the employee while participating in vocational rehabilitation. However, a requirement should be added making the employer responsible for paying all expenses connected with the return-to-work plan, including the claimant's expenses.

New Section 8(i)(3), as proposed by S. 1182, provides a method for the lump sum payment of settlements. We believe that the current law which does not allow this practice should be retained.

S. 1182 would base entitlement for occupational diseases (other than hearing loss) on the qualifying requirements of the workers' compensation law of the State in which the worker was last exposed to the disease producing stimulus (proposed new Section 8(j) of S. 1182). We believe it would be inconsistent to establish a uniform national standard for one occupational disease--hearing loss--while providing for varying standards for other occupational diseases that would differ from State to State. This approach is not in keeping with the uniformity that is the underpinning of the exercise of Federal jurisdiction over navigable waters. Moreover, as administrators of the Longshore Act, we would find it difficult to administer such varying standards.

Section 9 (Compensation for Death)

First of all, S. 1182 repeals the unrelated death provision which was added to the Act by the 1977 amendments. We support this repeal; it should not be part of workers' compensation benefits.

S. 1182 would not change the current $1,000 allowance for funeral expenses. This allowance was last change in 1972 and we think it is now appropriate to raise it to $3,500.

References in the current Act to "widowhood" and "dependent widowerhood" should be change to "dependent surviving spouse" to require that dependency status be uniformly approved regardless of the sex of the survivor.

Upon remarriage, the surviving spouse receives a lump-sum amount equal to two years' compensation and the surviving children thereafter become eligible for increased compensation. The language in Section 9 concerning the children of a remarried surviving spouse has been subject to varying interpretations as to when the children become eligible--immediately, or after the lapse of two years. Recent judicial interpretations have held that the children should begin to receive the increased compensation immediately. S. 1182 would not alter these provisions. We recommend that a new Section 9(b) be placed in the Act to clarify the language to state that children's benefits shall be increased immediately upon the remarriage of the surviving spouse.

Section 10 (Determination of Pay)

S. 1182 would alter the mechanics of computing average weekly wages using the employee's earnings record during the year previous to the injury. We prefer the formula in S. 1182--simply one fifty-second of a year's earnings or portion thereof--over the cumbersome one in the current law. The big difference, however, in S. 1182's formula is that it would limit income for the purpose of paying compensation to that earned in the same type of occupation as that in which the employee was injured. We disagree with such a limitation in the earnings computation, and suggest that the treatment of income in S. 1182 be changed to include earnings from all jobs during the preceding year, not just maritime employment.

Section 12 (Notice of Injury or Death)

The current Act's provision states that failure by the employee or survivors to give timely notice of injury or death to the employer shall not bar a claim for benefits if the employer had knowledge of the injury or death. S. 1182 would restrict the employer's knowledge not to the injury or death but to knowledge of its employment-relatedness. We prefer the provision in the current law.

Section 13 (Time for Filing of Claims)

S. 1182 would make no change in Section 13. We propose providing that for cases of occupational disease or cumulative trauma, the time for filing a claim begin on the date of impairment, or manifestation of disability, and/or date of first medical treatment for the occupational disease which is the subject of the claim. The present Act provides that time begins to run when the employee becomes aware of the relationship of an illness and employment. We suggest that the section further provide that a claim for disability or death shall be barred if not filed within three years after injury or death. If payment was made without an award, the amendment should provide that claims may be filed within three years after the date of last payment of compensation.

Section 14 (Payment of Compensation)

We believe that Section 14 should be retained with the following changes:

- Set the interest rate for past due compensation and penalties at the current Treasury bill rate.
- Section 14(g) requires that the employer notify the deputy commissioner within 16

days after a final compensation payment is made to the employee. S. 1182 provides for notice within 30 days. We propose that notice be required within 21 days.

- Section 14(j) specifies the method for computing the present value of future compensation for purposes of approved lump-sum payments. We suggest that Section 14(j) be retained and amended to specify the use of a more recent mortality experience table than the ones now specified, such as the tables used by the Social Security Administration.

Section 20 (Presumptions)

S. 1182 would repeal the presumptions contained in Section 20. We suggest that the presumptions be retained but that they be modified to place a greater burden on the claimant to prove entitlement to benefits under the Act. This modification is necessary because the courts have progressively interpreted Section 20 to the point where an employer is required to disprove nearly all aspects of a claim under the Act.

Section 22 (Modification of Awards)

S. 1182 would make no change to Section 22. We suggest that the time limit for modification by the Deputy Commissioner of an award either granting or denying compensation be lengthened from one to three years. We believe this extended time is necessary in the interests of administrative equity as one year has proven to be an insufficient amount of time for reconsideration of changing of physical condition of the claimant, especially in the case of occupational diseases.

Section 28 (Fees and Services)

S. 1182 would remove authority contained in Section 28(a) from the Deputy Commissioners to approve awards for the payment of attorney fees for services rendered to claimants in successfully pursuing their claims. Such authority, under S. 1182, would be exclusively that of the Benefits Review Board. We do not favor this procedural change as we perceive no reason to withdraw this authority from the deputy commissioners.

Section 30 (Reports)

S. 1182 would change Section 30 to provide that an employer must file the required injury report if he has actual knowledge of an employee's injury or death even though the employee failed to properly make a report. We agree with the change but would not include the word "actual." We would simply require knowledge of the employee's injury or death.

Section 31 (Penalty for Misrepresentation)

S. 1182 would make misrepresentation a felony--increasing the monetary penalty from $1,000 to $50,000, and imprisonment from one year to five years. We support felony penalties in willful cases.

Section 38 (Penalty for Failure to Secure Payment of Compensation)

Although S. 1182 would not change Section 38, we propose that the penalty in Section 38(a) for failure to insure the payment of compensation be increased from a maximum of $1,000 to $1,000 for each day compensation is not secured. In addition, employers who have not secured coverage under the Act should not be eligible for relief under section 8(f).

Section 39 (Administration and Vocational Rehabilitation)

S. 1182 would delete the requirement in section 39(c)(1) that the Secretary of Labor provide claimants with information and assistance, including legal assistance if necessary, in processing their claims. We favor retaining the requirement but there is no need for authority to directly represent claimants.

Section 41 (Safety)

S.1182 would repeal Section 41 of the Act, which requires covered employers to maintain safe working places and install safety devices, as determined by the Secretary of Labor. We believe that the safety provisions should remain in the Act. We understand that both employee organizations and the shipping industry oppose its repeal.

Section 45 (Administration Fund); Section 46 (Appropriation)

We endorse the repeal of Sections 45 and 46 by S. 1182 as they are no longer necessary.

Section 49 (Discrimination Against Employees Who Bring Proceedings)

S. 1182 would alter the anti-discrimination provision by stating that the discharge or refusal to employ any employee who has filed a fraudulent claim for compensation shall not violate Section 49. We agree with this change.

I would finally suggest the Subcommittee explore the current legal uncertainty surrounding the status of the District of Columbia extension of the program and consider any steps necessary to allow the District to proceed with its own workers' compensation program.

Mr. Chairman, this concludes my prepared statement. I would like to reiterate my pledge that the Administration will work closely with the Subcommittee in developing legislation to make appropriate changes in the Longshore Act. Your bill, Mr. Chairman, and our recommendations are both designed to improve the Act and restore some balance between the two fundamental principles of any workers' compensation program--financial security for injured workers and work incentives for their return to work.

My colleagues and I will be happy to answer any questions that you or the members of the Subcommittee may have.

Senator NICKLES. Thank you, Mr. Collyer.

I appreciate the work which you and the administration have put into the Longshoremen's Act and to the needed revisions. I think your statement reflects and shows a great deal of fairness. It examines proposals, I think, on both sides and adopted portions of what were recommended in our bill as originally written under S. 1182 and also for some fairly significant changes, too, which I would like to discuss with you just briefly.

Under the coverage, you mentioned primarily going back to water's edge, and that was the coverage that was in effect prior to the 1972 amendments; is that correct?

Mr. COLLYER. Yes.

Senator NICKLES. Under the bill, it talked about point of rest. Would you discuss the pluses and minuses of the two?

Mr. COLLYER. Mr. Chairman, the point of rest seems to be a floating boundary, whereas water's edge was the original boundary created by a jurisdictional dispute. In some ways, it is unfortunate that the Congress in 1927 sought to establish a separate act for these particular people working in the harbors. They could have easily granted jurisdiction to the States to cover these people under the State workers' compensation programs and we would not even have had to have the Longshoremen's program. However, since the program exists, and there does not seem to be great sentiment for sending it back to the States, where probably it should be, we feel that going back to the original jurisdictional line is the clear, objective way to proceed.

Senator NICKLES. I was interested in your comment in the statement that the Longshoremen's Act was the result of a Supreme Court ruling back in the twenties.

Mr. COLLYER. Yes, 1927.

Senator NICKLES. There has been support, I might mention, when this issue has been approached. Senator Quayle and others, I think, have mentioned the idea that it was still his belief that possibly this should be strictly covered under State plans.

Do you think there is some justification for that?

Mr. COLLYER. Well, I think that is a viable option. Whether or not the interest groups would get together on something like that at this time, I do not know, but I would certainly, personally, support something that was done along those lines.

Senator NICKLES. Then it is something we might look at.

Mr. COLLYER. All right.

Senator NICKLES. I would love to throw away these 4 days and countless hours of work in trying to revise this.

Mr. COLLYER. I do not need any more programs, that is for sure.

Senator NICKLES. If we did have a water's edge definition in the shipbuilding or repairing industries, how would you classify, say, dry docks, which sometimes have water in them and sometimes not?

Mr. COLLYER. I guess "water's edge" is probably not the definition. I would say injuries occurring on the water. In other words, if something is fixed to the land, whether there is water around it or not, if an injury occurs on that object, that would be State coverage—a bridge, for instance. The fact that the person falls off the bridge in the accident, and hits the water, that is not really working on the water; it is working over the water. I would think on any vessel, anything that floats, the person on that vessel would be covered under the Longshoremen's Act. If they are on the land, the ship is still on the land, whether it is in drydock or whether it is being built, that would be State coverage.

Senator NICKLES. And if you are on a port area and you are working in a warehouse, and the items have already been placed on the dock, and they are picked up and moved over to a warehouse by some type of U-haul vehicle, a trailer or forklift or something, then that would be covered under the State plan?

Mr. COLLYER. Under the State. If you could manage to have one foot on the dock and one foot on the ship, and be injured, I would be glad to go out and arbitrate that particular dispute, but I do not think that is going to happen very often. It is either on the ship or on the dock.

Senator NICKLES. Bill S. 1182 has a list of those specifically excluded from coverage, as well as definitions of longshoreman, harbor worker, ship repairman, builder, and breaker. Would these be necessary in your approach, or do you think water's edge would take care of that?

Mr. COLLYER. I think water's edge would take care of it--whether we use the term "water's edge" or "on the navigable water," that is the debate.

Senator NICKLES. As I am sure you are aware, we had a considerable amount of discussion with various members from the industry and also from labor, concerning the definitions and trying to tie down the definitions, and it is quite possible that you would have to be a lot more concise.

On the benefit maximum, do you agree with the subcommittee or with S. 1182 that benefit increase for permanent total disability and death beneficiaries must be capped; you suggest a 6-percent rate, close to the 7-percent annual increase average since 1972. However, since the 6-percent rate that you suggest is all tax free, would not the benefits still be increasing out of proportion, say, to the national average?

Mr. **Collyer**. They would be increasing, but not at the rate they are currently increasing. I believe October 1, it was 8.87, which is too high. It would be easier for me to support no indexation at all, because I believe any kind of indexation is inflationary. However, it would be difficult to support, if you are going to have indexation, 3 percent as opposed to 6. Six percent was just pulled, literally, out of the air, but it was approved by the Cabinet Council.

Senator **Nickles**. Do you have the figures with you, Mr. Hartman, possibly, as far as what those increases have been, say, from 1972 up until now? I would just like to have those for the record if you have them available.

Mr. **Montone**. Do you want the year-by-year, annual?

Senator **Nickles**. Yes, if you would.

Mr. **Montone**. In 1973, it was 6.49 percent; in 1974, 6.26 percent; in 1975, 6.74 percent; in 1976, 7.59 percent; in 1977, 7.21 percent; in 1978, 8.05 percent; in 1979, 7.43 percent; in 1980, 7.03 percent, and in 1981, 8.87 percent. The average of those is 7.3 percent.

Senator **Nickles**. Thank you.

Also, Mr. Collyer, you agreed with S. 1182 on the concept of spendable earnings to compute benefits, rather than on gross wages. You suggest some alternatives to compute this and state that initially, the number of exemptions claimed on Federal form W-4 would apply to compute spendable earnings. This implies a procedure later to change this number. If that is correct, please explain how this would be adjusted later.

Mr. **Collyer**. It is a matter of expediency to go in first with the exemptions listed on the W-4 form. There is not a lot of dispute. It is easy to calculate the benefits based on that, and it gets the benefit check out in a hurry.

In my own case, I claim no deductions on the W-4, zero, so that reduces my spendable income in my net check. It is our feeling that 6 months after the increase, some appropriate period, let persons still on the rolls have the opportunity to come in and prove that they do, in fact, have 10 dependents or no dependents or whatever, and have the benefit adjusted accordingly. The Deputy Commissioner would handle such a procedure.

Senator **Nickles**. You mentioned that it would be something similar to what has been proposed for changes under FECA?

Mr. **Collyer**. Yes.

Senator **Nickles**. Could you explain that just a little further?

Mr. **Collyer**. Well, it is the same thing. The original FECA proposal that had been around for 2½ years simply taxed benefits. And I frankly do not feel that we should begin to tax casually. It just adds to the overall cost of the program. It is a much more simple way to go about it to simply make benefits taxable and use a percentage of gross income, because there is a lot of equity that flows through there. However, if we start in that direction, we will be taxing benefits of all sorts, and I just do not think that is the way to go.

We feel that we can arrive at spendable income in much the same way that you have in your bill, by deducting mandatory taxes and even local taxes and apply a percentage to the spendable figure, in our case—and yours, as well—it is 80 percent. And by the way, this was recommended by the National Commission. Any time the maximum benefit exceeds 100 percent of the national average weekly wage, you should convert from a percentage of gross income to 80 percent of spendable income. And that is certainly where we are with this act now at 200 percent. A 20-percent reduction in the benefit from spendable income serves as an incentive to return to work.

Senator NICKLES. Would we be going to the Federal Government, or how would we come up with that? Would it be a table, as some States have set up for deductions——

Mr. COLLYER. It would be probably 50 tables, based on at least the 50 jurisdictions—a little more complex than one case such as Iowa, which has had this in effect for quite some time, and I think Michigan just went to this formula. As more States exceed the 100 percent, they will be converting to 80 percent of spendable. So that is not really an unusual or new concept.

Senator NICKLES. Do you think it would be that difficult administratively to come up with those?

Mr. COLLYER. Not if you watch the first table. In Iowa, I understand, an insurance company volunteered to produce this table through their computer, and everyone accepted it because it was so nice and compact, and they found out 2 years later that the program was in error, and they overpaid everyone by about $10 dollars for 2 years.

No, I do not think there is any problem.

Senator NICKLES. On the question of choice of physician, and this is probably a fairly controversial item—if I remember testimony, we heard of flagrant cases of abuses. We also heard of the right to have one's physician also. But under S. 1182, we had one set, and you changed that. Would you restate your position?

Mr. COLLYER. What we are suggesting is very close to the way the act now reads. It is a fact that in a nonlitigious jurisdiction, free choice of physician is not a bad thing at all. In fact, it is much more positive than it is negative. But as the act becomes rather generous, there are large amounts of money involved, all factors are applied to create more money. It just happens that way.

In some cases, physicians can be selected who are rather liberal in their treatment and their billing, and their estimates of disability. Once those are found, it is just normal for an employee to gravitate to those physicians. There are not many of them. There are very few. Most physicians are divided down the line, which is the best medical you can possibly hope for.

In the case where it is demonstrated that physician "X" has a tendency to inflate the claim and look at the legal side rather than the medical side, the employer will know this, the Deputy Commissioner will know this. And if the employee chooses that physician, and the employer objects to it, the Deputy Commissioner will simply assign that treatment elsewhere. If the employer objects, the employee goes to another physician. This does not mean that the employee has to wait around if he has been injured. He can go to any doctor he wants to for initial treatment. It is the continuing treatment that the employer/carrier might object to, and we would give the Deputy Commissioner authority to make that change.

Senator NICKLES. If the employer objects and the employee goes on to find another physician, does that come from a list supplied by the Deputy Commissioner or the employer?

Mr. COLLYER. The Deputy Commissioner would just assign the employee to another physician. He could check with the employer and the employee and probably try to work out something. Lists are very difficult to maintain. Doctors die just like anyone else. It is just a lot of administrative time trying to keep up with those lists. It is better just to use the phone book or some other approved list in the State or the jurisdiction.

Senator NICKLES. So anything that the Deputy Commissioner would sign off on would be OK?

Mr. COLLYER. Yes.

Senator NICKLES. Would it have to be agreed upon by the employer?

Mr. COLLYER. It would not have to be, no.

Senator NICKLES. In offsets, you indicated that workers' compensation should be the primary payer during a beneficiary's normal working life. Would you please elaborate further on how to integrate social security disability payments with longshore payments?

Mr. COLLYER. Sure. It is my feeling that workers' compensation programs are a unified system with a battery of services to provide. It is not just a piece of what is going on; it is the whole thing—medical care, income maintenance—really, total care for the person who needs it.

To fragment that and bring benefits of a lesser amount in from other sources disrupts the program. We would much rather have the workers' compensation program provide total care, including all income, during the period when the employee could or should be returning to work. Once the employee reaches retirement age, it is no longer really a workers' compensation system, it is more of a retirement system. At that point, we would say that social security benefits could come into play, and we would suggest that only 50 percent of those benefits be taken advantage of by the employer because that is the 50 percent he contributed, so he would not be paying double during retirement years.

Senator NICKLES. Let me see if I've got that. During the person's normal working life—and I guess that would be up to normal retirement age, which is 65, or is it before that?

Mr. COLLYER. Well, there is an option at 62, but it is 65.

Senator NICKLES. All right, let us say it is 65. Then, if they were to receive, say, a longshoremen's benefit, and it computed out to be $480 a month or whatever, they would receive that dollar for dollar, with no reduction—or, they would receive that initially, and then the social security disability payment would be reduced by that amount until age 65?

Mr. COLLYER. Yes, that is the way the current social security law reads. And there is a prohibition against reverse offsets where a State or a jurisdiction could take advantage of a social security payment; that has been corrected. So that during the period of normal working life, the full payment would come from the workers' compensation program, and then social security would become primary, at least to 50 percent of the benefit that is available, and would reduce the workers' compensation payment.

Senator Nickles. So beyond age 65, an employee—or now, a disabled, retired employee—would receive 50 percent of an offset?

Mr. Collyer. The employee would receive his full social security retirement benefit.

Senator Nickles. No reduction in the social security?

Mr. Collyer. None.

Senator Nickles. And a 50-percent reduction for every dollar received in social security on their Longshoremen's Act?

Mr. Collyer. Yes, because that is the employee's money, and the employer should not be able to take credit against the employee's contribution. He is only taking credit against the employer's contribution, which is 50 percent.

Senator Nickles. Explain to me how you figure that is an employee's contribution.

Mr. Collyer. It is a 50–50 share into the fund. So the employee has paid in 50 percent, theoretically, and the employer has paid in 50 percent. At retirement age, the employer's duty to return that person back to work is over, and the employer should not take credit for the full social security benefit, because half of it is the employee's. We think only a 50-percent offset should be applied. It is like a savings account of the employees. The employer should not be able to take advantage of that.

Senator Nickles. Are there currently any notice requirements between social security and the Department of Labor to insure that payments are not duplicated?

Mr. Collyer. I do not know of any, no.

Senator Nickles. Do you expect that there is a great deal of duplication today?

Mr. Montone. I think the Social Security Administration has the responsibility now to offset workers' compensation. I think the thing that is currently going on is a cross-tracking project between the Department of Labor, through the GAO, to insure that SSA has in fact been identifying people who have been receiving workers' compensation.

Mr. Collyer. That is true of disability, but with retirement, I do not believe there is, because there is no offset in the social security Act with regard to retirement. Only social security disability is an offset now.

Senator Nickles. That is where my confusion was coming from earlier. I was thinking of social security, which has no offset whatsoever, but social security disability income does have the offset, and that is where you were coming from on the 50–50.

Mr. Collyer. That is right. We allowed the social security disability offset to operate to make us primary, which is fine. But then we convert, with no offset under social security, to an offset under workers' compensation, after retirement.

Senator Nickles. Senator Williams, we welcome you, and you can interject. I am asking a few questions and have a few more to go and I will be happy to finish those, or I will let you have some time, if you would like.

Senator Williams. I would prefer it if you would finish yours, Mr. Chairman. I have not seen Mr. Collyer's statement until I arrived, so I would like to review it.

Senator NICKLES. Fine. I will continue, and you can interject any time.

Senator WILLIAMS. Thank you.

Senator NICKLES. Under partial disability, you stated that the maximum disfigurement allowance should be changed to 20 weeks instead of the current maximum of $3,500.

Mr. COLLYER. Yes.

Senator NICKLES. You further indicate that payment of both cosmetic damages under section 8(c)(20) and physical impairment compensation for the same injuries should be prohibited. Could you give us your rationale for that?

Mr. COLLYER. Yes; cosmetic disfigurement can be a serious impairment to someone's working. We feel that the figure that is in the act, or an amount up to that, is probably not sufficient. It should be put in the schedule based on weeks, and evaluated by the physician as to how bad the disfigurement is. It would just be an easier way to produce the figure rather than taking a fraction of a dollar; so many weeks for that particular disability. But it should not apply in addition to other scheduled injuries. If there is no impairment other than something cosmetic, that should be the payment.

Senator NICKLES. There should not be duplication?

Mr. COLLYER. Right.

Senator NICKLES. But we still should not have the maximum of $3,500?

Mr. COLLYER. I just think it is too low.

Senator NICKLES. They may have some extensive skin grafting, or whatever it might be, that might run it up to more than that.

Mr. COLLYER. Right.

Senator NICKLES. You state that permanent partial disability cases under section 8(c)(21) of the current law—that is, cases not specifically listed in schedules of sections 8(c)(1) through (20)—should have benefits calculated on the basis of the injured employee's demonstrated actual wages and wage loss, rather than the present system of eliminating a person's wage-earning capacity. Would you allow any evidence as to an employee voluntarily limiting his income?

Mr. COLLYER. Well, it is hard to—I have no cases to give you. But any time there is an estimate of disability, one of the problems with workers' compensation is that it is a disability program rather than an ability program; we should be estimating ability and get on the positive rather than the negative side. It is just a problem with any of these factors that are not well-defined. If you try to estimate someone's wage-earning capacity loss, it has to be an indefinite thing. There are always new areas of vocational rehabilitation to be discovered, new jobs open up. Any attempt to estimate this wage-earning capacity loss and then try to quantify it in dollar terms, I think, is an injustice to the employee because the employee tends to gravitate in that direction. And it means more money—that is just human nature. If it is actual loss of wages, and you replace only a percentage of the loss, the incentive there is to earn as much as you possibly can. The reverse is true under the estimate.

Senator NICKLES. Under temporary partial disability, do you think it is unfair to impose the maximum time limit of 5 years? This was not changed in the 1972 amendments, nor by S. 1182. Do you think that this is unfair?

Mr. COLLYER. It is not a big item. It is possible that someone who is temporarily partially disabled could be in a situation where he is continuing to improve, and there is no reason to rate such people permanently disabled if there is still a good chance that they can come back to full employment. So I do not believe a cap in terms of years on temporary partial is really all that necessary.

Senator NICKLES. Pertaining to the second injury fund, S. 1182 would provide an attorney to protect the second injury fund. You indicate different steps, one of which is to charge the fund for cost of its legal defense. Please compare this with the attorney approach in S. 1182.

Mr. COLLYER. It is about the same thing. I feel that the second injury fund, the special fund, should be defended by the Deputy Commissioner at the front end of the claim. Any indications that the second injury fund should come into play should be apparent at that time. The Deputy Commissioner should then screen the cases that should properly go into that fund.

I see little need for defending the fund at a later stage by the Solicitor, although if that is necessary, it should be provided.

Senator NICKLES. You also indicate that section 8(f) should be limited to conditions actually known to the employer before the injury. Whose burden of proof should this be to find out what type of preconditions might have existed?

Mr. COLLYER. That is a provision in a number of the State laws. Under this particular situation—since we are involving ourselves in the water's edge, we are now talking about longshoremen—and conditions actually known would require a preemployment physical. Whether you can impose that kind of a test on gangs working back and forth on the docks, I would not press it. I think obvious physical impairments would constitute actual knowledge of the employer, something that is major. The thing is, we do not want to put small pieces of information together to indicate a magnified preexisting disability and then tap the fund for the money. That is what is happening. We have to screen it so that the original disability or the preexisting disability was substantial. This has to be worked out in terminology. It has to be something that the employer can live with. As it is now, the courts are saying that the employer could have discovered the disability, had he gone through the search, which to me means preemployment physical, which might not be appropriate in this case.

Senator NICKLES. You also suggest extending an employer's liability for an employee with prior disability from 2 years to 5 years. Would this, require the employer, rather than the special fund, to pay for rehabilitation and discourage the hiring of handicapped?

Mr. COLLYER. I do not believe it would. I believe that it is possible to have the employee sign an employment application—maybe the union hall could handle this—wherein he discloses any previous disability, and that would be available as a record.

Senator NICKLES. Is that done in other types of employment?

Mr. COLLYER. Is that done?

Senator NICKLES. In construction or other——

Mr. COLLYER. Well, when you have long-term employment anticipated, in many cases, there is a preemployment physical to determine whether the person can do the job that is going to be required, is physically able to do the job.

Senator NICKLES. Excuse me. Do those physicals usually have a clause stating, "I know of no other physical impairments that may jeopardize production at my job or impair me in any way", or something like that?

Mr. COLLYER. I would think so.

Senator NICKLES. I am trying to remember one. I think it did have something like that.

Mr. COLLYER. I think so. They go through the list of diseases that you have had and that sort of thing. It is quite a long, extensive list of items to check. But the 5 years instead of 104 weeks just extends the employer's involvement in the process to cut down on the temptation to utilize the fund in every case possible. This is not unique to the Longshoremen's Act. It has happened in a lot of States. There are a few little ways to get at the money. The second injury fund. The temptation there is to go after it, and what we want to do is shut that down.

Senator NICKLES. You also mentioned in your testimony the rapid increase we have seen in taking on the second injury, or the number of claims and payouts from the second injury fund. Could you give us some record, for the record, to analyze or illustrate this growth?

Mr. COLLYER. In 1973, the total paid from the fund—I have not seen this particular exhibit——

Senator NICKLES. I could not recall seeing those figures. That is the reason why I wanted to know.

Mr. COLLYER. It is tremendous. I think it went from a few thousand dollars in 1976 to over $5 million now, as I recall. Yes; it went from $80,000 in 1976 to $10 million in fiscal 1981 excluding the District of Columbia workmen's compensation.

Mr. MONTONE. Ten million one hundred and fifty thousand for fiscal 1981, excluding the District of Columbia.

Senator NICKLES. Do you have the number of claims, what it was in 1976, as compared to 1981?

Mr. COLLYER. Yes; 19 in 1976 and 834 in 1981 excluding the District of Columbia.

Mr. MONTONE. That is the cumulative total now. That is the total existing 8(f) that accumulated since 1976, those 19. In other words, the 834 is a cumulative number, the total number of 8(f) cases in the 8(f) pool in 1981, and the total 1981 cost to support all 8(f) claims was $10,150,508 for 1981 again excluding the District of Columbia.

Senator NICKLES. And that goes all the way back through 1976? It includes the claims made in 1980, 1979——

Mr. MONTONE. No, no, the $10 million is the single year cost of 8(f). The total number of Longshoremen's Act cases put into the fund in 1981 is 293. The total existing 8(f) Longshoremen's Act cases that accumulated through 1981 is 834.

Senator NICKLES. What we have is a lot of claims that will continue.

Mr. **Montone**. Our current recurring 8(f) costs are running about $7 to $7.5 million right now, excluding the District of Columbia.

That is with all the cases in there. If you had no more Longshoremen's Act cases next year, it would cost you about $7.6 million.

Senator **Nickles**. Could give us a year-by-year illustration of the number of claims and payouts, so we can show the pyramid as it is growing and have some kind of idea for the trend for the record. If we do not get some kind of limit on that fund, I think we are talking about a very serious problem in the future.

[The information follows:]

LONGSHORE ACT PROGRAM*

Second Injury Case Growth-Section 8(f)

	FY 1976	FY 1977	FY 1978	FY 1979	FY 1980	FY 1981
1. Total No. of 8(f) cases in Fund at end of FY	19	44	128	297	541	834
2. 8(f) Cases added each year to Special Fund		25	84	169	244	293
3. Yearly 8(f) payments	$80,000	$296,000	$1,071,000	$2,539,000	$5,688,000	$10,151,000

* Excludes District of Columbia Workmen's Compensation Act.

Mr. **Collyer**. Let me point out, Mr. Chairman, that we are not talking of a fund that is similar to the black lung fund that involves Federal dollars or borrowing. This is a fund that is paid entirely by employers and carriers through assessments, so they are paying for it. We just think that things are being abused, and some of the employers and carriers are getting a bad deal because they are not participating at the right end of the fund.

Senator **Nickles**. On the case review, you recommend transferring adjudicatory responsibilities now given to the administrative law judges to the Deputy Commissioners and eliminating the administrative law judge level. How many DOL Deputy Commissioners currently conduct longshore hearings?

Mr. **Collyer**. Well, we conduct no longshore hearings at present. We do not have the authority to conduct hearings. That is the point. We conduct informal conferences which are necessary and we would want to retain. It is creating a formal record that the Deputy Commissioner cannot now do, which he had the authority to do pre-1972. The administrative law judge is just a step in the process now, the first hearing step. We would like to move that first hearing step back to the Deputy Commissioner so he can deal effectively with the claims at the front end, frame up the issues, and then, on appeal, send the records to the Benefits Review Board.

Senator **Nickles**. They would go directly to the Deputy Commissioner and then to the Benefits Review Board if it were contested?

Mr. **Collyer**. Yes; and there is absolutely nothing wrong with administrative law judges. It is just an extra step in the process. We would like to speed this up so that the time of litigation is cut down and the cases resolved in an efficient manner.

Senator **Nickles**. Would you need more Deputy Commissioners to make this change, if the responsibilities were increased?

Mr. **Collyer**. I do not believe so. If the coverage under the act is brought back to the original jurisdictional line, we expect that the claims volume will drop more than 50 percent, and this should even it out.

Senator **Nickles**. One other question, and I will turn it over to Senator Williams for his input. We had some discussion under the intoxication provision, and under the bill, we inserted the word "solely" before "intoxication". Would you make any changes in the manner in which "intoxication" is defined—or I think you were taking the word, "solely", out; is that correct?

Mr. **Collyer**. Well, as I understand it, any level of intoxication, where there is a contributing cause to injury, would remove the claim from coverage under the act, under your version, is that right?

Senator **Nickles**. Yes.

Mr. **Collyer**. I have the feeling that that might be a little strong. I suspect that these people are hard-working, hard-drinking people—I would, if I were on those docks, I will tell you——

Senator **Nickles**. We have a lot of people in Congress like that. [Laughter.]

Mr. **Collyer**. I would hate to see an employer entrap an employee just because the employee had a beer at lunch, or something. I just do not think that is fair.

Senator NICKLES. How would you define intoxication?

Mr. COLLYER. Well, I think——

Senator NICKLES. Would it be according to State law?

Mr. COLLYER. No. I think it would be up to the Deputy Commissioner, based on the evidence at hand. If witnesses said that the employee was incapable of doing the task that he was asked to do, and he hid this from the employer and sneaked on. Maybe he had been advised not to go on the job that day because he was intoxicated, but he went out anyway. If reasonable precautions were taken by the employer to prevent that person from entering the docks—that is the kind of case, I think, that you would not want to have on the employer. Anything short of that, I think it is the employer's responsibility to get rid of that person. If he sees evidence of drinking on the job, or coming to work apparently intoxicated, send him to the medical clinic, and just send him back home if it appears he cannot operate. But I think it is the employer's duty to watch the employees, and if the evidence suggests that an employee had had a couple of beers at lunch, during the day, and he was injured on the job, I do not think that should be used, if you call that intoxication, the fact that he had been drinking; I do not think that should bar the claim at all. And that is just a level, or a matter of degree, I guess. How you would define it in terms of blood alcohol content, I do not know. I think that is probably going a little too far.

Senator NICKLES. On a somewhat related point, how should occupational diseases be compensated under the Longshoremen's Act?

Mr. COLLYER. Well, we think they should be treated as under existing law, as injuries. Occupational disease would be the same as injury. And I notice that your bill would utilize the various occupational disease statutes within the States. You get into a little bit of a problem. There might be a dispute as to which State is involved. That would create some problem. I do not think there is any problem in using the act as it is currently written, if the statute does not begin to run until the employee knows or should have known he has a disease caused by the work and it is disabling. So there are no statutory problems.

Senator NICKLES. Senator Williams, do you have some questions or a statement or any input you would like to make?

Senator WILLIAMS. I regret that I was not here at the beginning, Mr. Chairman, and when I left for the weekend, I did not have your statement, Mr. Collyer.

Mr. COLLYER. I apologize for that.

Senator WILLIAMS. Well, it is my loss. I can see it is a very thoughtful, well-developed position that you bring to us. And my weekend would have been improved if I had been reading this over the weekend.

Senator NICKLES. You did not have much of a weekend.

Senator WILLIAMS. Well, if you are a Redskins fan, what kind of a weekend could you have?

Mr. COLLYER. That ruined my weekend, too. [Laughter.]

Senator WILLIAMS. So I will have to go back now—I skimmed your statement, and things jump out at me, and I would just like to touch on some.

I am first impressed with your statement that it is not the administration's intent to press your views on the parties or on this subcommittee, and rather, you are looking forward to working with the committee in efforts to develop the best possible legislation that can be enacted to, once again, make this program one which can meet its stated goals.

I just wonder now, when you say you do not want to press your views on the parties nor on the subcommittee—the Longshoremen's Act and the revisions proposed are obviously a matter of very great interest to not only the administration and Congress, but the parties involved. I just wonder if there has been any way for you at the executive side to bring these parties into any kind of discussion of what the best way to arrive at any changes would be.

Mr. COLLYER. We have found at least three best ways, Senator Williams. We have met with the interest groups on numerous occasions. We have gone out of our way to solicit their comments and suggestions, not only with regard to statutory changes, but failure on our part in the administration of the act. We want to know what we can do to do our job better. The statement that you read there refers to the fact that we are not bringing a bill saying that this is it, this is what we want. We are just commenting on the program generally, and in some respects, commenting on S. 1182.

Another feature of that is the 6-percent cap. We do not want that to signal an administrative position on indexation, whether it is the level, or whether there should be indexation, on any other program. It is strictly confined to the Longshore Act. That is what I was trying to get clear.

Senator WILLIAMS. The broadest area of the bill is the narrowed definition of coverage of the act.

Mr. COLLYER. Yes.

Senator WILLIAMS. And as I read it, it would establish water's edge, basically, as the jurisdictional point—geographical point, really.

Mr. COLLYER. Yes, the original line.

Senator WILLIAMS. Now, that was the law at one point, water's edge. And I am sure you deal with the history here, and I have not read your description of the history, but there must have been problems then to suggest a change from water's edge to the present law and which led to also another geographical, but less defined place—that is where the cargo is at rest; is that basically the way it was described?

Mr. COLLYER. Both the situs and the status of the employee, and where the cargo rests, and where that person usually performs that maritime type activity, yes. It is a completely different theory than the jurisdictional problem.

Senator WILLIAMS. I know that at the witness table, there is a lot of knowledge of the history of these various tests, and I just wonder what prompted a change from water's edge to the present law, and what were the problems with water's edge then?

Mr. COLLYER. The thing that prompted the change was a feature under admiralty where employees working aboard ship could sue the vessel owner for the ship being unseaworthy, and the owner of the vessel then sought indemnity through a hold-harmless agreement in the contract with the employer, the stevedore. This constituted a circumvention of the exclusive remedy doctrine in all workers' compensation acts. It is the exclusive remedy as to the employer. This was just a contractual arrangement around it. And the stevedores, or the employers, came to the Congress and asked for that to be changed. They wanted out, they wanted these hold-harmless agreements to be null and void, they wanted the suits against the vessel owner for other than negligence to be abolished, and the Congress did this. This was a major accomplishment for the stevedores because they had again perfected the exclusive remedy doctrine.

But through the process of making this important change, other changes were made, and in 1972, the States had still not raised all their benefit levels as they are today. There has been tremendous change—and you, by the way, are one of the people responsible for the change that has taken place in State laws from 1972 until today.

So there was a disparity in benefit levels, and there was every attempt to get shoreside, if possible. So they created this different system for determining where the line should be. And we are saying today that benefits under the Longshoremen's Act are going to be tempered somewhat. Benefits under State law are coming up; there is less reason to want to go one way or the other. It should be as if you are walking either in the rain or out of the rain, or you walk back and forth, in and out of the rain. That is the way they described it at the time, walking in and out of coverage under the Longshoremen's Act. There should not be that much difference. As a matter of fact, in the State of Alaska, the benefits are higher shoreside, and State coverage is higher. Thus, the tendency would be to go the other direction. So we are achieving a balance here. We feel that the thing that should be determining would be whether or not the employee is working on navigable waters. In fact, we suggested the change in the title of the act to the Navigable Waters Workers' Compensation Act of 1981 to do just that.

This change was just incidental to the more important reason, which was circumvention of the exclusive liability provision in the act. Other changes came in as well.

Senator WILLIAMS. This question of walking in and out of coverage evidently is not, in your opinion, a troublesome administrative nightmare, with the incentive to shop for more favorable coverage?

Mr. COLLYER. I think it is still there, but I think it is diminishing. As I said, as the State laws come up, and the Longshoremen's Act tempers itself somewhat, there is less tendency to try to reach one line versus another.

Senator WILLIAMS. Under the water's edge jurisdictional point, the injured party makes a selection where it is thought coverage is and starts the procedure under the employee's selected jurisdiction; is that the way it works?

Mr. COLLYER. Well, that is not our intent. Our intent is to have it rather clear that if the injury occurs aboard a ship or any vessel floating on navigable water, that the act applies. If it occurs on the land, or if it occurs on something fixed to land, then it is stateside coverage. We tried to make it that clear.

Senator WILLIAMS. If you fall off the wharf, is that State jurisdiction?

Mr. COLLYER. I would consider that State.

Senator WILLIAMS. Isn't that one of the situations that led to a lot of dispute?

Mr. COLLYER. Well, that was one of the problems, but I think we can clarify that. The employee was not working in the water. The employee was on his own time when he hit the water, trying to get out. Falling off the dock was the injury—I do not mean to be facetious about it. But the accident happened on the wharf and not in the water. If the employee were in a small boat on the water and fell out of the boat—fine, it would be Longshore.

Senator WILLIAMS. How about falling on the lines attached to the boat?

Mr. COLLYER. Attached to the boat?

Senator WILLIAMS. Yes.

Mr. COLLYER. Standing on the dock?

Senator WILLIAMS. And falling on the line, and the line is slippery, and over he goes.

It seems to me it is a lawyer's delight.

Mr. COLLYER. Well, yes, it has been recently. I think we can clarify it. Before you came in the room, I mentioned that an employee standing with one foot on the dock and one foot on the boat is stupid, No. 1, because that is not the way you enter a boat, but if he is injured in that process, I suppose you would have either the State taking jurisdiction, or we would take it under the Longshore Act. But those should be very rare. The old gangplank injuries are common ones; walking toward the dock, it is State, and toward the ship, it is Federal. We can stand those. I do not think there are that many injuries on the gangplanks anymore.

Senator WILLIAMS. I did not follow completely your last discussion on the intoxication question, but I just got the impression that you are moving away from any relationship of intoxication to the injury, to some more practical and I would consider reasonable relationship between drinking and the act.

I have forgotten, Mr. Collyer, at the time that you came to this position, what your background is. It impresses me that you must have worked in this world of employer-employee standards for some time.

Mr. COLLYER. Yes; I worked in redwood mills in California to get through college. I never worked on the dock itself——

Senator WILLIAMS. No; I meant in terms of experience with compensation systems.

Mr. COLLYER. Oh, compensation. I have done this for 20 years. Mr. Hartman has been in it for over 50. So it is a program that has been around for a long time. I have looked at a lot of claims. In the recent past, I have not been involved in the detailed processing of claims, but in the overall area of the philosophy of workers' compensation. But I have had quite a few years of actual claims experience. I have seen and interviewed claimants in their own homes, and I have a lot of compassion for the people who are injured.

Senator WILLIAMS. Coming back to drinking and the mixing of drinking and working, sometime ago, it was suggested to me that the Occupational Safety and Health Administration might well be advised to get involved in this area, particularly in situations where the employer furnishes the alcoholic beverage.

It was a brewery worker who talked to me, and he was alarmed at what he had observed among his colleagues on the job—and there is the "beer break" in some areas, you know.

Mr. COLLYER. I understand that, yes.

Senator WILLIAMS. Nothing has been done about bringing this to the Occupational Safety and Health Administration for possible standards—has anybody thought about this?

Mr. COLLYER. It sounds like a very delicate issue to me, with regard to the employees.

Senator WILLIAMS. Well, it was from where I come from, I will tell you, very delicate.

Mr. COLLYER. I would suspect that Secretary Auchter has larger fish to fry right now, but eventually, he will probably get around to that particular issue, as well. What he is going to do about it, I do not know.

Senator WILLIAMS. This is rooted in the brewery industry. Evidently, since the beginning of brewing, it has been part of the work scene.

Mr. COLLYER. That is right.

Senator WILLIAMS. And an old one that we might well be advised to let the executive take responsibility rather than the elected side.

Mr. COLLYER. I would go along with that, yes.

Senator WILLIAMS. The position on choice of physician that you take is different than the bill that came to us, am I right?

Mr. COLLYER. Yes, somewhat.

Senator WILLIAMS. The first selection is of the injured, with an opportunity for the employer to go to the Deputy Commissioner if the employer does not think he in any way objects to the employee's selection.

Mr. COLLYER. For whatever reason.

Senator WILLIAMS. Yes; and this is much different than the employer's panel, which is the bill.

Mr. COLLYER. Yes; panels are just difficult to maintain and update. Administratively, it is a problem. Ninety-nine percent of physicians are competent to treat in their own specialty, and most of the medical treatment you get out there is pretty good, but there are a few bad apples that lean one way or lean the other. That is a fairly short, unwritten list. It is known by the employers; it is known by the unions, the employees; and it is known by the Deputy Commissioners. I think we could just take a more evenhanded way about this. If an employee goes to a physician who is known for exaggerated claims or whatever else, the employer can ring the bell, and the Deputy Commissioner will probably agree with him and reassign the treatment to someone else. That is a very simple way to handle it, and a pragmatic way.

Senator WILLIAMS. I am sure there must be experience involved with this technique.

Mr. COLLYER. Surely.

Senator WILLIAMS. And it works out?

Mr. COLLYER. Yes; but maintaining panels is really a problem, because as I mentioned to the chairman, physicians die, just like everyone else. If these things are not constantly updated, it causes employees problems because they go to an address that no longer houses the physician. We should have something that is very, very current when it comes to medical treatment, and panels are just a bad experience.

Senator WILLIAMS. I know you did deal with this change from the administrative law judge as the hearer of these cases to the Deputy Commissioners.

Mr. COLLYER. Yes.

Senator WILLIAMS. It has been observed to me by staff that each region has one Deputy Commissioner; is that right?

Mr. COLLYER. Yes.

Senator WILLIAMS. So it would require a buildup, under your proposal, of that force of Deputy Commissioners.

Mr. COLLYER. No; the person who deals with the claimant as he walks in the door, who holds an informal conference, tries to get whatever problem that employee has straightened out informally, just by calling the employer or the carrier. And if there are disputes on issues which cannot be resolved through this informal conference, they go right to a hearing as quickly as possible, get a decision by the Deputy Commissioner, who knows more about the claim than anyone else. Send that up, if it is disputed, to the Benefits Review Board for quick determination—it could go on to the courts beyond that, of course, the court of appeals—and have the employee know early on what the decision is going to be in his case. All we are doing is removing not the administrative law judges, but we are removing a step in the process, that is all—another delaying step, in my opinion.

Senator WILLIAMS. For my clarification, how does it work now?

Mr. COLLYER. The Deputy Commissioner does hold informal conferences, talks to both sides, asks for evidence to be submitted, and makes a recommendation. If the recommendations are not followed or are not agreed upon by the parties, then they request a formal hearing. At that point, it does go to the administrative law judge, who holds, on a request, a hearing, and makes a formal determination. If that determination is unsatisfactory to one of the parties, they can appeal that on up to the Benefits Review Board, who again treat the issues, and if there is dispute with the Benefits Review Board decision, then it goes to the court of appeals.

Senator WILLIAMS. So your proposal would take out the administrative law judge step?

Mr. COLLYER. Yes.

Senator WILLIAMS. Informal, formal, through the Deputy to the Benefits Review Board, and then to——

Mr. COLLYER. The court of appeals—just to speed up the process.

Senator WILLIAMS. What do you hear from the parties involved here, employers and employees? How do they like this proposal, do you know?

Mr. COLLYER. The administrative law judges? I do not recall that we have had any large dispute one way or the other. But as I mentioned before, the intention is not to get rid of the administrative law judges The intention is to speed up the process and cut down the time of hearing. This is a no-fault statute, and there should not be any disputes. There should not be much. We are only administrators. We should not even see these claims, as a matter of fact. It should all be between the employer and the employee and the insurance carriers and the doctors. As far as I am concerned, leave the lawyers out, except in those very few cases where there is an honest dispute, and then this process works, hopefully, very quickly and efficiently.

Senator WILLIAMS. Good luck. This has not been the history, speeding up to greater equity. There are a lot of delays in all compensation cases.

Mr. COLLYER. I know, I know. It should not be.

Senator WILLIAMS. I think I have nothing further, Mr. Chairman.

Senator NICKLES. Thank you, Senator Williams.

I would like to follow up on that just a second, if I could, Mr. Collyer. How much time do you think we could eliminate as far as processing claims? Do you have any idea on what the average claim time now is if it should go?

Mr. COLLYER. It is too long. The ones that are appealed on up to the Benefits Review Board?

Senator NICKLES. Appealed, yes. Do you have any estimates, and if you do not have that, do you have any estimate on what kind of time we could save by eliminating this step?

Mr. HARTMAN. Substantial time could be saved. And I just might inject here, in further response to Senator Williams' question, prior to 1972, when the Deputy Commissioners had hearing authority, for some 8 to 10 years prior to that, they had averaged 300 formal hearings per year, countrywide. Of those 300, 35 cases were appealed to the Federal district courts each year.

In 1980, 3,117 cases were received for hearing to the ALJ's, more than tenfold. In the first year 11 months of 1981, 3,091, and it is projected 3,800 in 1982.

The delay in preparing the case and in moving it and in scheduling the hearing—no case is heard by an ALJ within 6 months, and the time beyond that is cumulative in the sense that the case may be referred, remanded, for the development of additional evidence—because keep in mind under the ALJ procedure, the Deputy Commissioner's and the administrative record does not go to the ALJ. The record is made by the administrative law judge, so that anything anybody wants in that record is a matter of procedural introduction of that, whether written, live testimony, or what-have-you, and then that record is binding upon the Benefits Review Board and upon the circuit court of appeals. The record today is made before the ALJ, so that the total record that has in essence been developed by the Deputy Commissioner is not a package that goes on.

Senator NICKLES. So he would do all of his homework, make his recommendations, it would not be accepted, and then the administrative law judge would basically do the same thing, in a more legal sense, for it to proceed up through the appeal process?

Mr. COLLYER. Correct.

Senator NICKLES. You could add several months by going through the ALJ?

Mr. HARTMAN. Well, the total time to get through the ALJ's—and for those incidentally, of the 3,000-plus cases sent to the ALJ's, the Benefits Review Board had appealed 437 cases in 1980, and in

1981, a projected figure is 494, and in 1982, it is projected there will be in excess of 500 cases—the delay period with the ALJ's and with the Benefits Review Board is running the timeframe up to 3 to 4 years, now.

Senator NICKLES. What happens to the injured worker who has a very legitimate claim of a hurt back or a broken whatever; is he receiving compensation during this interim period of appeals?

Mr. HARTMAN. If there has been an award made or a recommendation made, and absent an application for a stay—and no stay has been granted, to my knowledge—then the benefits continue until that claim is finally adjudicated. Now, if the claim has been denied initially, and is on the course of appeal, then there is no income under the Longshoremen's Act benefit provisions.

Senator NICKLES. Just a followup on a somewhat related thing, do you have any suggestions concerning changing the current law on awards of attorneys' fees?

Mr. HARTMAN. I think it is working reasonably well now.

Senator NICKLES. How does it work right now?

Mr. HARTMAN. Well, prior to 1972, the attorneys' fees were very low, but they were liens upon the claimant's award. If he got a $1,000 award and a $100 fee, the claimant got $900, and the attorney got $100. Today, and since 1972, under section 28, the attorneys' fee concept is predicated upon the following: The employer or carrier makes a tender of, let us say in a scheduled loss, 20 percent of the right hand. The claimant's medical shows that it is greater, and his attorney concludes they are going to ask for more. If that is increased, say, to 35 percent, the attorney's fee is predicated upon the increased recovery, the 15 percent between 20 and 35. So that it works well as a procedural matter. As a matter of fact, there is more litigation, however, over attorneys' fees than there is on the merits of the cases.

Senator NICKLES. Is that right?

Mr. HARTMAN. Yes.

Senator NICKLES. I have no further questions.

Senator Williams?

Senator WILLIAMS. Just one question. On those numbers of cases you have described here, past, present, and projected, what percentage of those are District of Columbia cases?

Mr. HARTMAN. Approximately 20 percent.

Senator WILLIAMS. While they are under the act, they are not, for your purposes, as you described it, included in this?

Mr. HARTMAN. Yes, they are.

Senator WILLIAMS. You deal with the District situation in your statement, I believe, Mr. Collyer.

Mr. COLLYER. Yes; we suggest that the District be allowed to operate under its own act that was recently developed. It is up to the Congress to decide that, apparently.

Senator WILLIAMS. I have nothing further. Thank you.

Senator NICKLES. Gentlemen, we appreciate your efforts. It is quite obvious from your testimony and from your answers to the questions that you are well versed, and you have given a considerable amount of input and study to a very complicated and detailed law.

For public information, we have scheduled a markup on this bill for October 28. We also will keep the record open for 2 weeks to give other Senators a chance to have questions submitted for the record, so the record will be held open for that purpose until October 19. Until that time, Senator Williams, I think it would be advisable if we could get our staff together and see if we cannot work up some joint amendments or changes or ideas prior to the markup, with some consultations from outside sources, also.

At this point I order printed all statements of those who could not attend and other pertinent material submitted for the record.

[The material referred to follows:]

LAW OFFICES
GALIHER, CLARKE, MARTELL & DONNELLY
1215 NINETEENTH STREET, N. W.
WASHINGTON, D. C. 20036
(202) 331-8330

RICHARD W. GALIHER *○
WILLIAM H. CLARKE *○
FRANK J. MARTELL *
WILLIAM J. DONNELLY, JR. *○
DAVID F. GRIMALDI *
WADE J. GALLAGHER *○
RICHARD W. GALIHER, JR. *○
SAMUEL F. McNEIL, III **
EUGENE L. CHRZANOWSKI *
W. BARRY WRAGA *○
CHARLES R. McBRIER, JR. *
STEPHEN P. ZACHARY *•
ELIZABETH J. HAEGELIN *○

*DISTRICT OF COLUMBIA BAR
○MARYLAND BAR
•VIRGINIA BAR

MARYLAND OFFICE
5 NORTH ADAMS STREET
ROCKVILLE, MARYLAND 20850
(301) 340-7400

VIRGINIA OFFICE
106 LITTLE FALLS STREET
FALLS CHURCH, VIRGINIA 22046
(703) 538-1770

OCT 1- 1981

October 13, 1981

Honorable Don Nickles, Chairman
4230 Dirksen Senate Office Building
Washington, D.C. 20510

RE: S. 1182

Dear Mr. Lawson:

This confirms our 'phone conversation on October 7 concerning my desire to express my concern as a result of reading the testimony of Robert Collyer, Deputy Under-Secretary of Labor for Employment Standards, before the United States Senate Sub-Committee on Labor and Human Resources. My background is as an attorney under the District of Columbia Workers' Compensation Act, representing mostly employers, but some injured workers, since 1972. Presently I am Chairman of the Workers' Compensation and Employers' Liability Law Committee of the Section of Tort and Insurance Practice of the American Bar Association. This letter cannot speak for the American Bar Association, but expresses my personal opinion as a practitioner under this Act.

Prior to 1972, the benefits were much lower than they are now, as you are no doubt aware. Hearings were held before deputy commissioners who issued subpoenas, some of which were not responded to because they were not from "a judge", took testimony, and made decisions in the form of binding orders. Since 1972, this function has been reserved by statute to the Office of Administrative Law Judges, U.S. Department of Labor. Mr. Collyer's testimony on October 5 indicates that he wants to go back to the deputy commissioner system, and that this should be part of your Bill, S. 1182. In this regard, I would like to voice my strong objection to this proposal on the part of the Under-Secretary. He comes from a state system of compensation where your first hearing results in an order of compensation. It is a more informal procedure and usually involves substantially less benefits. In the state system, however, most commissioners hearing testimony and making decisions are lawyers. In the deputy commissioner system, as presently staffed by the U.S. Department of Labor, the deupty commissioners are not attorneys. (The deputy commissioner in this area in 1972 was, in fact, an attorney by the name of Jack Garrell, who has since retired.) By the proposal to go back to the deputy commissioner, the deputy commissioner system involves lay people. The deputy commissioner hires claims examiners, who will make the first decision, and then under the deupty commissioner system, the deputy commissioner will review the decisions of the very people that she hires. If the deputy commissioner had confidence enough in the people to hire them, then it is expected that she would probably prefer to accept the commission recommendation from one of her staff, as opposed to finding against the staff member under her.

Such practice will certainly lend itself to the same charges concerning conflict of interest, which are now being leveled at the Benefits Review Board and the Director, OWCP. These charges of possible bias and prejudice were, as I understand it, the reason why your Bill proposes to take the Benefits Review Board out from the Department of Labor and make it a separate independent agency of Government. This does not mean, however, that the Administrative Law Judge system is the best answer at all times either but, a group of independent judges, and especially if these judges are assigned to a specific division, for example to hear only Longshore cases or only Black Lung cases, rather than to have them hear cases under 45 different government acts, as they now do, would increase the efficiency of the Administrative Law Judges in a manner to correspond with the extent of criticism they are now receiving because of the slowness of some of their decisions. We have presently one deputy commissioner in the District of Columbia and 40,000 employers in the District of Columbia. The statistics concerning the number of claims and hearings under the D.C. Act I am sure area already available to you and your staff. You cannot work on the assumption that no additional personnel or staffing will be required if this case goes back to the deputy commissioner's office. She will not be able, in this jurisdiction, to handle the large volume of cases that would be thrust upon her by hearing on a continuing basis, if such a measure concerning abolition of the Administrative Law Judges is passed. To propose that no additional staffing would be required may seem like good Reaganomics, but practically speaking, will not be accurate.

I have also heard that there is some proposal to abolish either the Benefits Review Board or the Administrative Law Judge level and to move it from the deputy commissioner's office to a two-tiered level whereby, after trial before an Administrative Law Judge, the case will be appealed directly to the U.S. Court of Appeals. I take no position concerning abolition of the Benefits Review Board, however, it must be noted that for a substantial number of cases, the Benefits Review Board has become an intermediary appeal level on the way to the higher court. The concept of a specialized body of judges familiar with this law to review the decision of Administrative Law Judges who may or may not be familiar with the law is, I believe, a good concept. Going to the Court of Appeals with a question concerning nature and extent of disability to a man's back is probably not an issue which the courts of appeals will wish to have in substantial numbers thrust upon them. If all those Black Lung cases on appeal at the Benefits Review Board were decided today, we have no indication of how many of them would be appealed to the court of appeals. Any initial determination of benefits under Black Lung, however, by an Administrative Law Judge will naturally go to the next higher appeal level wherever it is. Placing them all in the courts is not a good idea as well, but if you have a case where you have to pay benefits and you have to go all the way to the Court of Appeals to get it straightened out, from the standpoint of the employer it is better to have a quick trip to the Court of Appeals rather than a slower trip through the Benefits Review Board to the Court of Appeals. However, I am not sure that the Court of Appeals will pay the necessary attention to these cases, and certainly not try to involve themselves in any expertise in this regard.

These are some of my thoughts concerning the proposal to go and abolish the BRB as an alternative to abolition of the Administrative Law Judges (as the choice has been phrased to me and may be phrased to you).

Another area of concern is the restriction of 8(f). I understand this is a very controversial proposal, but it must be remembered that the statute with respect to the terminology involved in the statute, has existed since the very beginning. The only thing that has changed is that the courts have accepted the modern reality that the average worker will not advise of a pre-existing condition in a pre-hire physical or application if there is a fear that divulging such information will cause one to lose consideration for the job being applied for. Despite the anti-discrimination statute of 1973 to assist employment of the handicapped, on Federal jobs, there has neither been the enforcement nor the following of the law by employers in hiring the handicapped. Why should an employer hire a disabled person who might get injured and lose time from work when he can hire an able-bodied person who is equally as qualified and presents no risk of work loss or injury. If it is the government's position that discrimination against the handicapped shall be avoided, as indicated by this statute for rehabilitation passed in 1973, such an incentive to employers herein should also exist despite the fact that some of the largest underwriters of coverage under the Act are feeling a pinch in annual assessments for the Fund. However, the purpose of this Fund is to prorate the loss among all parties involved and this should be done on a continuing basis despite the objections which have been made. The objections, as I understand it, are that somebody is getting hit too hard by the assessments. Apparently, in other jurisdictions there has been a claim that there has been collusion between employers and claimants in securing benefits from the Special Fund. The Administrative Law Judges have been very concerned about this as well. The end result to that has been in some instances, as I understand it, employers have not fought the determination of permanent total disability as strongly as they might have in some cases. However, probably the only thing that has happened in that instance is that, rather than the Administrative Law Judge finding that the proof of the employer was insufficient to rebut the claim of permanent total disability, that the employer has agreed up-front that the man was permanent total disability without waiting for the Administrative Law Judge finding. Indeed, the partial 8(f) cases are the most difficult to settle because no one can agree to what the percentage of partial disability is. It is much easier to say the person is permanent total and find a date for maximum medical improvement and get onto the next case. This is a problem with the regulations, not the statute, and also problem as to the way this section of the statute has been poorly administered in the past. Employers have been uniformly, in this area, unwilling to go to the deputy commissioner for determinations of 8(f) because the deputy commissioner takes too much time to grant or deny 8(f). If it's denied, you end up before the Administrative Law Judge anyway. I don't think the problem is with the statute on 8(f), but those who have poorly administered it in the past. Thus, restriction of 8(f) will affect both employers and claimants because employers will be unwilling to hire the handicapped and claimants will be reluctant to divulge any handicap they have, thus creating an army of unemployed handicapped workers who must lie about their disabilities to secure consideration for jobs which they might otherwise be qualified for, despite their disabilities.

The above remarks are not the position of the American Bar Association in this matter because, within the time limits now involved, it is impossible to get any kind of consensus or to take an official position as I understand it. However, I hope the comments contained herein will be of some assistance to your staff in getting the opinions of practitioners apart from legislators or administrators, and in determining what is feasible for operation under any new act proposed.

Thank you for your consideration of this matter.

Very truly yours,

Richard W. Galiher, Jr.

cc: Mr. Robert Collyer
Deputy Undersecretary of Labor
Employment Standards Administration
U.S. Department of Labor
Washington, D.C. 20210

The Honorable Robert G. Mahony
Administrative Law Judge
U.S. Department of Labor
1111 Twentieth Street, N.W.
Washington, D.C. 20036

Thomas D. Wilcox, Esquire
1899 L Street, N.W.
Washington, D.C. 20036

Mark L. Schaffer, Esquire
Ashcraft & Gerel
2000 L Street, N.W.
Suite 700
Washington, D.C. 20036

RWGjr/ss

HAMILTON AND HAMILTON
ELEVENTH FLOOR
734 FIFTEENTH STREET, N.W.
WASHINGTON, D.C. 20005

TELEPHONE (202) 347-8882

GEORGE E. HAMILTON, SR. 1853-1946
JOHN L. HAMILTON, 1913-1981

GEORGE E. HAMILTON
STEPHEN A. TRIMBLE
RICHARD W. TURNER
NICHOLAS D. WARD

JAMES B. SANSFIELD*
PATRICK KAVANAUGH
DAN R. FREE

* ALSO MEMBER OF MARYLAND BAR

WILLIAM A. GLASGOW
CLARENCE G. PECHACEK
OF COUNSEL

MARYLAND OFFICE
THE ADAMS LAW CENTER
27 WOOD LANE
ROCKVILLE, MARYLAND 20850
(301) 424-3330

October 14, 1981

The Honorable Don Nickles
Chairman, Subcommittee on Labor
and Human Resources
United States Senate
Washington, DC 20510

Dear Senator Nickles:

Before you close the record on S.1182, please allow me to briefly comment.

The Bill is generally a good one and certainly the present Longshoremen's and Harbor Workers' Compensation Act needs amendment.

In my judgment, however, the proposed amendment to Section 7 of the Act is a monstrosity. All this amendment would do is create more paperwork for the Deputy Commissioner and employer, would pose a continuous problem of revision, and unquestionably eliminate some well-qualified and fair-minded physicians and include some unqualified and/or biased physicians. The employee should maintain the right to select his own physician, but the Deputy Commissioner must be directed to promptly order an impartial examination upon request by the employer. The Deputy Commissioner should have the authority to bar physicians who, by a continuous course of conduct, demonstrate their unfitness or bias as to one side or the other.

Apparently the Labor Department would take us back to the "good ole days" by eliminating administrative law judges and substituting, therefore, deputy commissioners to make not only the recommendations which presently come under that office, but also to hold hearings and make findings of fact and interpretations of law. Such a move would neither save time or money. The

Deputy Commissioners and their examiners now make recommendations which can be freely accepted or rejected by either party, and innumerable cases are presently disposed of at this level. However, the Deputy Commissioners and the examiners presently have a workload probably beyond their capacity, and the proposed amendments to restrict coverage, although it might be helpful, would be insignificant. There would be a great need for more deputy commissioners and a large travel budget to make them available for full-blown trials under the Administrative Procedures Act. I mean no disparagement to the present Deputy Commissioner nor to their examiners; however, few, if any, of them are lawyers and even fewer would be qualified to sit as judges in a trial.

The present system of using the administrative law judges for formal hearings certainly in most cases gives us a well-qualified judge who has been carefully screened for his qualifications to hold a *de novo* hearing on matters not agreed upon at the informal level. This, by the way, is not a review, but let me repeat is a *de novo* hearing with both sides able to present all of their evidence and to have it adjudicated in a reasonable manner in accordance with the law. The proposed system which would place both the informal resolution process and the formal process in the same office is unrealistic for anyone expecting a fair trial. How could a claimant whose claim has been rejected by a deputy commissioner or his examiner at the informal level expect a fair trial from someone in the same office. The present system of administrative law judges separates these two powers, and the written record is created before the administrative law judge who has no real connection with and could not be biased by anything which happened at the informal level. One of the great failures of the Act prior to the 1972 amendments was the inability to keep separate the functions of administering the program and sitting in judgment at the hearings.

Time precludes my making of further comment.

Respectfully submitted,

HAMILTON AND HAMILTON

Richard W. Turner

RWT/bi

THAD COCHRAN
MISSISSIPPI

COMMITTEE ON
AGRICULTURE, NUTRITION,
AND FORESTRY

COMMITTEE ON
APPROPRIATIONS

United States Senate
WASHINGTON, D.C. 20510

OCT 2 0 '81

October 19, 1981

Honorable Don Nickles
Chairman
Subcommittee on Labor
Committee on Labor and
Human Resources
A-609 - Immigration Building
Washington, D. C. 20510

Dear Don:

Mr. Paul Franke of Gulfport, Mississippi has shared with me his concerns regarding proposed amendments to the Longshoremen's and Harbor Workers' Compensation Act.

I understand that your subcommittee is scheduled to meet October 28 to consid[redacted]gislation designed to improve the administration of LHWCA. I would appreciate your including the enclosed documents forwarded to me by Mr. Franke as additional remarks for th[redacted]

Thank you for your assistance in this matter.

Cordially yours,

Thad
THAD COCHRAN
United States Senator

TC:jk

Enclosures

FRANKE, RAINEY & SALLOUM
ATTORNEYS AND COUNSELORS AT LAW
2408 FOURTEENTH STREET
GULFPORT, MISSISSIPPI 39501

PAUL M. FRANKE, JR.
WILLIAM M. RAINEY
RICHARD P. SALLOUM

POST OFFICE BOX 1466
TELEPHONE 868-7070
AREA CODE 601

October 12, 1981

The Honorable Thad Cochran
United States Senate
321 Russell Senate Building
Washington, D.C. 20510

Re: Proposed Amendments to the Longshoremen's and Harbor Workers' Compensation Act

Dear Senator Cochran:

It was indeed a pleasure to have visited with you this past weekend at Ole Miss. I appreciate your invitation to write you concerning amendments to the Longshoremen's Act that have been proposed by representatives of the Department of Labor. As you are probably aware, our practice of the law requires us to appear before the U. S. Department of Labor on behalf of both claimants and employers with regularity. The Subcommittee on Labor, Committee on Labor and Human Resources, has under consideration S. 1182 and testimony was taken on October 5, 1981, by the Committee with Mr. Robert B. Collyer, Deputy Under Secretary of Labor for Employment Standards, as one of the witnesses. A copy of Mr. Collyer's statement is appended hereto. It is our understanding that the Committee has requested that any additional remarks be presented to them pertaining to the amendments to the Longshoremen's Act by October 19, 1981, and further that markup of the Bill is scheduled for October 28, 1981.

We would appreciate the comments contained hereinbelow concerning amendments to the Longshoremen's Act being submitted to the Committee. Beginning on Page 8 of the statement of the Deputy Under Secretary, he describes the Department of Labor's position on nine key issues, and we would address those issues as follows:

Coverage: We completely agree that coverage under the Act be returned to the water's edge as it was prior to the 1972 amendments. Should for some reason the Deputy Under Secretary's position not be addressed, we would offer the following alternative language to the coverage section:

> Section 3. No compensation shall be payable in respect to the disability or death of --
>
> (1) A Master or member of a crew of any vessel, or any person engaged by the Master to load or unload or repair a small vessel under 18 tons net: [or]
>
> (2) An officer or employee of the United States or any agency thereof or any state or foreign government, or any political subdivision thereof[.]: or
>
> (3) Any employee none of whose work performed on the day of injury for the employer from whom compensation or benefits are sought required direct participation in the immediate process of loading, unloading, repairing or building a vessel.

Benefit Maximums: We concur with the proposal of the Deputy Under Secretary concerning this matter.

Spendable Earnings: We agree with the Deputy Under Secretary's position pertaining to spendable earnings.

Choice of Physician: We would propose a different solution of the choice of physician problem. We would suggest that a national panel of doctors be used. A Deputy Commissioner who is liberal would simply refer employees to liberal doctors and one more conservative would suggest referrals to a more conservative doctor. However, if the employee is allowed to make an initial selection of a treating physician, then the employee should be required to designate that physician within 30 days from the date of accident or the same should thereafter be waived. In some cases a claimant is now permitted to make a so-called initial choice of physician several years post-injury. The amendment should limit the medical expense to an examination only and not treatment and should be paid by the carrier or employer where the previous medical findings of the doctor selected by the employer or carrier are upset, but paid by the employee if the previous medical findings are confirmed.

Offsets: While we do not disagree with the suggestions made under the caption "Offsets", we would suggest that there be added thereto an offset for each additional benefit that the claimant receives from any source other than Social Security.

Wage Base in Partial Disability Cases: We do not disagree with the comments under this caption.

Second Injury Fund: We disagree with the comments made under the caption "Second Injury Fund". We would point out there is more and more reliance upon this fund and the reason is that very few defenses, such as statute of limitations or jurisdiction, are recognized. We disagree with subparagraph (b) because instead of allowing the Department of Labor to limit the fund's usage, we would suggest that Congress specifically spell out the applicable limitations, if any. With respect to subparagraph (c) we would oppose any additional costs be allowed to the Director for legal defense as his office is presently participating in cases where he is uninvited and wasting taxpayers' money, and believe the language suggested by Congressman John Erlenborn (R-Illinois) in HR. 25 appointing a conservator out of money contained in the special fund to be a sound resolution of the problem.

The fairest manner in which to deal with previous injuries would be a pure apportionment statute simply reducing ones subsequent impairment or disability by that percentage which pre-existed the injury. Therefore, we would suggest that current Section 8(f) be repealed in its entirety and the following language substituted:

> Section 8(f)(1). In any case in which an employee having an existing permanent physical impairment or permanent disability, whether or not known of or manifest to the employer at the time of injury, suffers injury, the employer shall provide compensation for that degree of disability found attributable to the injury, based upon the average weekly wages of the employee at the time of the injury. If the injured employee shall have worked during substantially the whole of the year immediately preceding his injury, his average weekly wage shall be computed in accordance with Section 10(1), less all compensation payable to said employee as a result of earlier disability awards entered pursuant to any workers' compensation act.

> Section 8(f)2. If following such injury, the employee has a permanent disability greater than that which pre-existed the injury and which is found not to be due solely to that injury, the employer shall provide compensation as otherwise provided in this Act for the disability found attributable to the injury alone, or for 104 weeks, whichever is the lesser.
>
> Section 8(f)3. After the cessation of the payments for the period of weeks provided for herein, the employee or his survivor entitled to benefits shall be paid the remainder of the compensation that would be due out of the special fund established in Section 44.
>
> Section 8(f)4. All death benefits otherwise payable pursuant to this Act shall be paid out of the special fund established in Section 44 if the entitlement to such death benefits arises in the period during which compensation is payable out of the special fund established in Section 44.

Case Review: We do not agree with the recommendations under this heading "Case Review". One of the primary objections of the 1972 amendments because of the innumerable complaints was to prevent a Deputy Commissioner who administratively made a determination in a case thereafter putting on a second hat and rendering a judicial opinion. A free exchange of information by and between the parties before a Deputy Commissioner is not had if that same person would thereafter preside over that case and make a binding decision on the parties. The very reason the second stage is necessary is because one of the parties is dissatisfied with the recommendations of the Deputy Commissioner and to revert to that system would only cause an additional delay of many months with a predicted result. We experienced more delays in the system that existed prior to the 1972 amendments than presently exist. Additionally, the litigants realize that Administrative Law Judges must meet higher standards to qualify for their position than Claims Examiners under the supervision of a Deputy Commissioner. Claims Examiners in the Deputy Commissioner's office would again be called upon to interpret complex legal issues for which they have no legal degree or legal training whatsoever. As an officer of the Court, an Administrative Law Judge is bound by the code of ethics of professional responsibility that does not attach to one who is not an officer of the Court and is placed in the position of having to wear two or possibly three hats that may be conflicting. The most important thing is not the time in which a case is heard or concluded but the guarantee of a fair and impartial hearing which the Administrative Law Judges provide as a result of the prerequisite which must be met in order to qualify for their position along with training and legal experience. For the reasons enumerated hereinabove, we respectfully submit that the Administrative Law Judges not be eliminated and there be no change in the order of case review. Perhaps there should be some consideration given to establishing a Benefits Review Board for each region in the nation (one for the southeast, one for the southwest, etc.).

The only expansion of authority that should be granted to the Deputy Commissioner or his Claims Examiners would be to allow them to approve orders of non-suit, dismissal, etc. as it does not make sense for an office to be in a position to accept a claim but not dispose of it by dismissing the action if no action is taken by one of the parties or if a voluntary non-suit is desired, otherwise the statute of limitations will not run unless a request is made for a full hearing and an order entered by an appropriate Judge. One should not have to request a hearing for the purpose of seeking a final order in a case where no justiciable issue exists.

Grandfathering: We are not certain what legal considerations were taken into account in this suggestion since it is our understanding that the Court applies the law in effect at the time that it hears a case. I will find some authority for this point if so requested.

In addition to the comments that we have offered hereinabove to the Deputy Under Secretary's position, we would suggest that the Committee consider defining several terms under the Act as presently there is no definition for (1) maritime employment, (2) longshoreman, (3) shipbuilder, (4) ship repairman, (5) harbor worker, etc.

There should be a definition for maximum medical improvement or recovery. We suggest that "maximum medical improvement" be defined to mean "a time that begins with the disabling injury and is a condition which exists until the injured employee is cured or is as far restored as the permanent character of his injury will permit". J. F. Crowe Well

Servicing Contractor vs. Fielder (1955), 224 Miss. 353, 80 So.2d 29; Laurel Daily Leader, Inc. vs. James (1955), 224 Miss. 654, 80 So.2d 770; Guess vs. Southeastern Utilities Co. (1956), 226 Miss. 637, 85 So.2d 173; Ebasco Services, Inc. vs. Harris (1956), 227 Miss. 85, 85 So.2d 784.

Another suitable definition for maximum medical recovery would be that described in the Gray vs. General Dynamics Corp., 5 Benefits Review Board Service (Bender) 279, 282 (1976), which states that maximum medical recovery is the date on which the claimant's disability ceases to improve and his condition remains stable or deteriorates thereafter.

The Section pertaining to the statute of limitations needs to be rewritten as some case law has destroyed completely its application. Post-amendment cases have held that the statute of limitations was tolled by the receipt in the Deputy Commissioner's office of a completed medical form from one of the claimant's physicians although this medical form was not even filed by the claimant or his attorney but simply mailed by the doctor's secretary. Our suggestion is that to interrupt the statute a written communication should be required from the claimant within the one-year period from a date of injury and the same should be served upon the employer to constitute proper notice.

The definition of "disability" should be amended to read as follows:

> "Incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment, which incapacity and the extent thereof must be supported by medical findings."

An amendment should be approved that would eradicate the post-amendment case law that has developed from the Administrative Law Judges' decisions interpreting Perini Corp. vs. Heyde, 306 F. Supp. 1321, 1328 (D. R.I. 1969) holding that when a worker is unable to return to his former employment or does not desire to return to that job, then the employer has the burden of finding suitable and available employment for him. This places an almost impossible burden on an employer, especially a small employer that is short-handed, of being in the employment-agency business. The implications of such a burden are obvious. "You can lead a horse to water, but you can't make him drink." Unless the claimant has an affirmative duty to seek out the other employment which is available to him, the chances of any employer finding him a job are not existent. What worker, in his right mind, is going to undertake a lessor paying job where he must earn the money he receives, when by sitting back on his duff he can reap the bounty of the expanded benefits now provided a totally disabled worker under the Act.

Finally, we would propose that the Director not be allowed to represent any party unless a claimant does not have private representation. A case is between a claimant and employer and it is improper for the Director to maintain that he is impartial if he undertakes representation of either party. I would refer the Committee to a case that we have on appeal on the issue of standing to the United States Court of Appeals for the Fifth Circuit entitled Ingalls Shipbuilding Division, etc. vs. John W. White, et al, Fifth Circuit No. 80-4002, and direct your attention to the Director's brief where he enumerates the power that he has to enter and participate in litigation. The Director theoretically takes part in these claims for the purpose of insuring proper administration of the Act on behalf of the Secretary of Labor, but a reading of the transcript in the Robinson C. Hallford vs. Ingalls Shipbuilding Division, etc., case, Benefits Review Board Nos. 81-848, 81-848A, will show that only a factual dispute exists between the parties and it has nothing to do with the administration of the Act. Attached for your review is a copy of recent correspondence which indicates the Director's active participation in the Hallford case, or in any case he desires to enter.

Using the excuse of insuring the proper administration of the Act on behalf of the Secretary of Labor for entering the claims, the offices of the Director has become a specialized legal aid service on behalf of claimants. The Director simply picks any case that he desires to enter and does so without the consent or approval of any parties involved. This is done at each and every level of litigation, whether it be trial level, Benefits Review Board level, or Fifth Circuit level. The Director's decision to enter a given case is not affected at all by the caliber of the private representation of the claimant. In several cases where we have been able to negotiate a settlement which has been approved by the claimant himself and by his attorney, the Director has appealed the decision dismissing the claim without regard to the desire of the claimant. The latest move by the Director in increasing his scope of authority is the entry into cases on appeal to the Fifth Circuit without compliance with the Federal Rules of Appellate Procedure. Instead of filing a motion to intervene as required by the Rules, the Director files a "Motion to Amend and Reform Caption" and automatically makes himself a party to the proceeding. This is done without prior notice to the parties and without a chance for the private parties to respond to the Motion. Although the employer is already required to pay the attorney's fees for the claimant's private counsel, it is the position of the Director that all pleadings and papers filed in any claim must be served upon his office also. Please refer again to the attached correspondence from the Director's office in the Hallford case. This is so even where the Director has made no effort to, and has no intention of, entering that case. Our most recent correspondence from the Director indicates that he will move to rescind the filing of any papers which we file with the Clerk of the Fifth Circuit unless the same are served on the Director. In summary, the Office of the Director has become a governmental adversary which intercedes in longshore claims solely on behalf of claimants.

The amendments should prohibit the Secretary from promulgating a regulation that allows him to enter a case at any level and second-guess the opinion of an Administrative Law Judge or the Benefits Review Board. In the White brief the Director claims that he has the authority to second-guess both the Administrative Law Judges and the Benefits Review Board. The action of the Director is worse than that of a Monday-morning quarterback as that role is merely one of a critic whereas the Director enters into proceedings and wants to play the whole ballgame of from the beginning after the same has been completely litigated.

We appreciate the opportunity to respond to the position of the Deputy Under Secretary of Labor and further to offer our comments herein. Should you or the Committee desire for us to elaborate on any position we have raised or on any matter whatsoever, please do not hesitate to contact me.

With kindest regards, I am

Cordially yours,

FRANKE, RAINEY & SALLOUM

BY: Paul M. Franke Jr.
Paul M. Franke, Jr.

lm

Enclosures

Senator **Nickles**. The subcommittee is adjourned.

[Whereupon, at 11 a.m., the subcommittee was adjourned.]

○